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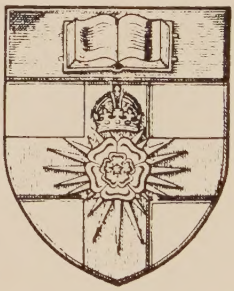

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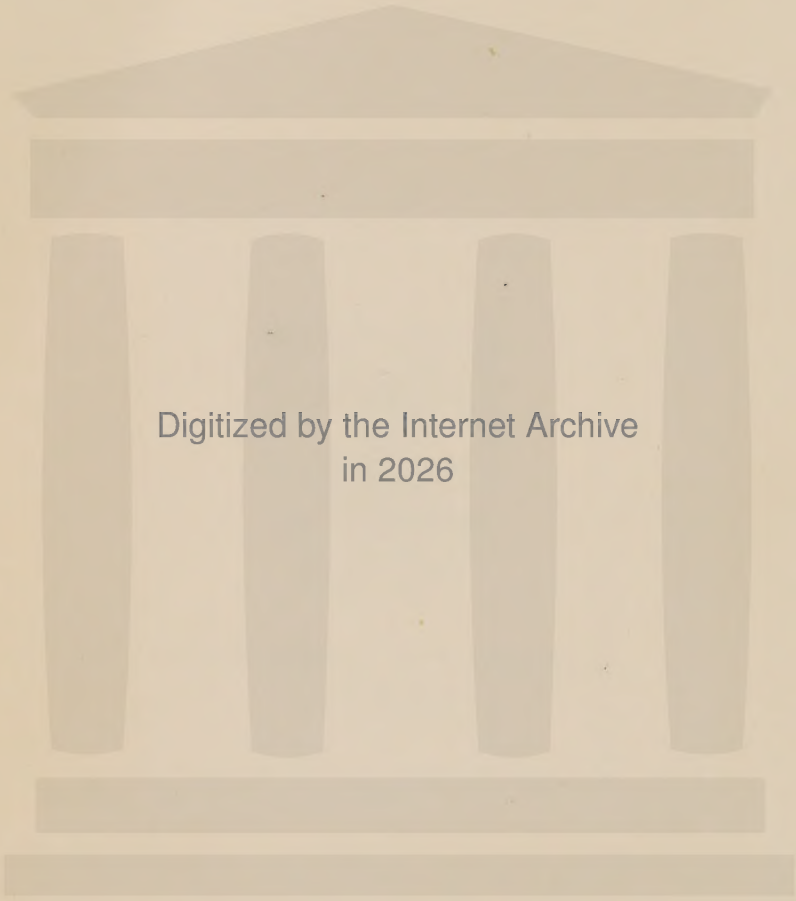
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1908
March 5.

NASH *v.* INMAN.

Infant—Necessaries—Actual Requirements—Evidence—Onus of Proof — Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 2.

In an action against an infant for necessaries the onus is on the plaintiff to prove, not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery.

Application for judgment or new trial.

The action was brought by specially indorsed writ by a tailor carrying on business in Savile Row, London, for 145*l.* 10*s.* 3*d.* for clothes supplied to the defendant while an undergraduate at Cambridge University between October 29, 1902, and June 16, 1903. The defendant was an infant at the time of the sale and delivery of the goods. He had been at school at Uppingham, and in October, 1902, he went up as a freshman to Trinity College,

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Cambridge. He was the son of an architect of good position, who had a town house at Hampstead, and a country establishment, called Wade Court, near Havant. The clothes supplied to the defendant included, among other things, eleven fancy waistcoats at two guineas each, or 1*l.* 15*s.* for cash. Upon an application for judgment under Order XIV., the defendant set up the plea of infancy, and the action was adjourned into Court and was tried before Ridley J. and a special jury. At the trial the plaintiff claimed only 122*l.* 19*s.* 6*d.*, the cash price of the goods, in lieu of 145*l.* 10*s.* 3*d.*, the credit price. The only witness called on behalf of the plaintiff was a traveller in his employ, who stated that he went to Cambridge and other places to solicit orders for the plaintiff, and that, hearing that the defendant was spending money freely and was likely to be a good customer, he called upon him personally at his lodgings in Cambridge and obtained the first order for clothes; and he gave evidence as to the goods supplied, and stated that they were charged for at the usual prices.

Counsel for the defendant thereupon submitted that, subject to his formally proving infancy, which was not admitted, there was no evidence to go to the jury, and he called the defendant's father, who proved the date of the defendant's birth, and then went on to state that he was satisfied that his son on going up to the university was amply supplied with proper clothes according to his position; and he gave particulars of his outfit. The learned judge then held that there was no evidence to go to the jury that the goods were necessaries, and directed judgment to be entered for the defendant.

The plaintiff applied for judgment or a new trial, on the ground that the judge himself had decided the issues of fact instead of leaving them to the jury.

McCardie, for the plaintiff. In an action to recover the price of necessaries supplied to an infant, assuming that the goods are suitable to the defendant's station in life, the onus is not on the plaintiff to prove that the defendant was not adequately supplied with goods of that description at the time of the sale; and if any of the goods are capable of falling within the description of necessaries, having regard to the defendant's condition in life,

the evidence ought to be left to the jury: *Maddox* v. *Miller* (1); *Brayshaw* v. *Eaton* (2); *Peters* v. *Fleming*. (3) In *Maddox* v. *Miller* (1), which was similar to the present case, a new trial was ordered on the ground that the plaintiff had been improperly nonsuited. The learned judge was therefore wrong in withdrawing this case from the jury. In *Steedman* v. *Rose* (4) it was held that the question of adequate supply was material in considering the question of necessaries, but the proper inference from the judgments in that case is that it was for the defendant to prove that he was adequately supplied at the time of the sale; and in *Burghart* v. *Angerstein* (5) the fact that the defendant was held entitled to adduce evidence that he was adequately supplied presupposes that the onus of proving that he was not adequately supplied did not lie upon the plaintiff. The Court will not throw upon the plaintiff the burden of proving a matter which by the nature of the case cannot lie within his knowledge: Best on Evidence, 10th ed. p. 247; and therefore it will not call upon him to prove the contents of the defendant's wardrobe. In none of the cases cited was evidence given by the plaintiff that he in fact was not adequately supplied; yet the point is an obvious one, and, if good, it is strange that it should not have been taken.

[COZENS-HARDY M.R. These cases may perhaps be accounted for by the fact that at that time it was not definitely settled that evidence as to quantum was admissible at all.]

In *Burghart* v. *Angerstein* (5) it was held that such evidence was admissible.

Dealing now with the modern cases, in *Ryder* v. *Wombwell* (6) the Court of Exchequer Chamber, reversing the judgment of the Court below, directed a nonsuit by reason of the innate quality of the goods, and held that the articles in question in that case were prima facie not necessary for maintaining a young man in any station of life, but the view of the Court was that, if the articles were such that they could under some circumstances be necessaries, the case ought to be left to the jury; the Court was not

(1) (1813) 1 M. & S. 738.
(2) (1839) 5 Bing. N. C. 231.
(3) (1840) 6 M. & W. 42.
(4) (1842) Car. & M. 422.
(5) (1834) 6 Car. & P. 690.
(6) (1868) L. R. 4 Ex. 32.

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there dealing with the question of quantum. *Barnes* v. *Toye* (1) decided a point which was left open in *Ryder* v. *Wombwell* (2), namely, that evidence that the infant was sufficiently supplied was admissible, but it did not touch the question of onus of proof. *Johnstone* v. *Marks* (3), in point of decision, was to the same effect, and the dicta in that case as to the onus of proof were obiter only, and are not binding on this Court. The onus is, of course, on the plaintiff to prove the defendant's station in life, but if he supplies the defendant with an article which prima facie is a necessity, the defendant, to escape liability, must give evidence that he is amply supplied.

[COZENS-HARDY M.R. The question now turns upon the definition of necessaries in the Sale of Goods Act, 1893, s. 2. It is for the plaintiff to shew that the goods are within that definition.]

That statute has in no way altered the law or cut down the right of a tradesman to bring an action against an infant.

[FLETCHER MOULTON L.J. referred to *In re Rhodes*. (4)]

Cecil Walsh (*Atkin, K.C.*, with him), for the defendant. This controversy is really determined in the defendant's favour by the definition of necessaries in the Sale of Goods Act. In the earlier cases there was great doubt whether evidence that the infant was adequately supplied was admissible at all. That doubt was finally set at rest by *Barnes* v. *Toye*. (1) Then *Johnstone* v. *Marks* (3) went a step farther and shewed that evidence on this head must form part of the plaintiff's case. Finally, those two cases are incorporated in the statutory definition. The moment that infancy is proved the onus is shifted on to the plaintiff to prove both that the goods were suitable to the defendant's station in life and that he was not already sufficiently supplied. In the face of the father's evidence the judge took the right view in saying that there was no evidence to go to the jury that these clothes were necessaries.

McCardie in reply.

COZENS-HARDY M.R. This case is undoubtedly one of difficulty and also, I think, one of importance. It is an action by a tailor

(1) (1884) 13 Q. B. D. 410.
(2) L. R. 4 Ex. 32.
(3) (1887) 19 Q. B. D. 509.
(4) (1890) 44 Ch. D. 94.

against Mr. Inman, who was at the date of the transactions in question an infant. There were no pleadings in the action. There was merely a writ and an application under Order XIV., and the action was adjourned into Court, and came on for trial before Ridley J. and a special jury. In substance the position is this: The plaintiff sues the defendant for goods sold and delivered. The defendant pleads infancy at the date of the sale, and his plea is proved. What is the consequence of that? The consequence of that is that the Infants' Relief Act, 1874, becomes applicable. Under that Act all contracts for goods supplied are absolutely void, the only exception being contracts for necessaries. Then s. 2 of the Sale of Goods Act, 1893, provides as follows: "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property." That, of course, includes the Act of 1874. Then follows this proviso: "Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor." The section then defines necessaries as follows: "Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery." What is the effect of that? The plaintiff sues for goods sold and delivered. The defendant pleads infancy. The plaintiff must then reply, "The goods sold were necessaries within the meaning of the definition in s. 2 of the Sale of Goods Act, 1893." It is not sufficient, in my view, for him to say, "I have discharged the onus which rests upon me if I simply shew that the goods supplied were suitable to the condition in life of the infant at the time." There is another branch of the definition which cannot be disregarded. Having shewn that the goods were suitable to the condition in life of the infant, he must then go on to shew that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendant's witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes upon him. Our attention has been called by Mr. McCardie, in his very able

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and learned argument, to a number of authorities going back for a very long period, which he said established that the burden on a plaintiff who supplied goods to an infant was simply to shew that the goods were of a class which might be necessaries, having regard to the position in life of the defendant and his family, and that, unless the judge withdrew the case from the jury on the ground that the articles in question could not be necessaries, it was for the jury to find as a matter of fact, Aye or No, were these articles necessaries? It had never, he said, been the law that the plaintiff was required to go into the question, which might present great difficulties, of whether or not the goods were actually required by the defendant at the date of the sale, or, in other words, to say what was the state of the defendant's wardrobe at the time when the goods were ordered. I think there is very great force up to a certain point in that argument. But it must be remembered that the law on this subject has been developed and altered in the course of the last century. It was until quite recently doubted whether it was even admissible to prove that the infant was supplied with goods of the class—being goods which might properly be necessaries—at the date when the contract was made, so that he really did not want any more. It was not until the decision of the Divisional Court in *Barnes* v. *Toye* (1) in 1884, overruling the direction given by A. L. Smith J., that it could be said to be at all established that that was even admissible evidence unless you went further and proved that the plaintiff knew he was sufficiently supplied. The point arose again in *Johnstone* v. *Marks* (2) before what was no doubt a Divisional Court, but it was composed of three members of the Court of Appeal, Lord Esher M.R., Lindley L.J., and Lopes L.J. In that case the county court judge had rejected evidence to prove that the defendant was sufficiently supplied with clothes at the time of the sale. Lord Esher said: "I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently

(1) 13 Q. B. D. 410. (2) 19 Q. B. D. 509.

supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." Lindley L.J. said: "If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him." Although it may be true that the language which I have just read from the judgments of Lord Esher and Lindley L.J. goes further than was absolutely necessary for the decision of the case, that language is perfectly clear and unambiguous, and seems to me to be logically involved in the definition of necessaries. After those two decisions there was passed in the year 1893 an Act of Parliament which defines, in a manner that admits of no doubt, what are those necessaries for which, and for which alone, an infant can be made liable on assumpsit, and that definition in terms includes the second element which Lord Esher and Lindley L.J. said was involved in the term "necessaries," and the burden of proving which, they said, rested on the plaintiff. That being so, how does the matter stand? The plaintiff called evidence to prove the delivery of the goods. It is not of course contended, and it could not be contended, that the infant would be liable for the credit price or for the cash price of the goods, because by the terms of the statute he is only liable for a reasonable price, but that is a subsidiary point. There being no pleadings, the infancy of the defendant was not admitted, and the father was called to prove the date of his son's birth. There was no cross-examination as to that, and the infancy is not disputed. Then he went on to give evidence, which was quite clear and explicit and was not shaken in cross-examination, that the infant, who was an undergraduate at Cambridge, and had just gone up to the university when these goods were supplied, was in fact supplied with clothes suitable and necessary and proper for his condition in life, and for his position as an undergraduate of Trinity College, Cambridge. The learned judge ruled as a matter of law that there was no evidence fit to be submitted to the jury that these articles, or any of them, were necessaries within the meaning of the statutory definition,

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and, thinking as I do that there was no evidence in support of that which was a necessary issue, I cannot say that the learned judge was wrong in the view which he took. We have scarcely heard any suggestion that there was even a scintilla of evidence to support that which is an affirmative issue, that the goods were suitable to the requirements of the infant. Nay more, I think, if the matter had been left to the jury, and the jury had found that they were suitable to the requirements of the infant at that time, and application had been made for a new trial, it would have been the duty of this Court to grant a new trial on the ground that there was no evidence to support the verdict, and that it was perverse. Under these circumstances it seems to me that this appeal fails, and that there is no ground for interfering with the judgment which was entered for the defendant.

FLETCHER MOULTON L.J. I am of the same opinion. I think that the difficulty and at the same time the suggestion of hardship to the plaintiff in such a case as this disappear when one considers what is the true basis of an action against an infant for necessaries. It is usually spoken of as a case of enforcing a contract against the infant, but I agree with the view expressed by the Court in *Rhodes* v. *Rhodes* (1), in the parallel case of a claim for necessaries against a lunatic, that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*. I do not mean that this nicety of legal phraseology has been adhered to. The common and convenient phrase is that an infant is liable for goods sold and delivered provided that they are necessaries, and there is no objection to that phraseology so long as its true

(1) 44 Ch. D. 94.

meaning is understood. But the treatment of such actions by the Courts of Common Law has been in accordance with that principle I have referred to. That the articles were necessaries had to be alleged and proved by the plaintiff as part of his case, and the sum he recovered was based on a quantum meruit. If he claimed anything beyond this he failed, and it did not help him that he could prove that the prices were agreed prices. All this is very ancient law, and is confirmed by the provisions of s. 2 of the Sale of Goods Act, 1893—an Act which was intended to codify the existing law. That section expressly provides that the consequence of necessaries sold and delivered to an infant is that he must pay a reasonable price therefor.

The Sale of Goods Act, 1893, gives a statutory definition of what are necessaries in a legal sense, which entirely removes any doubt, if any doubt previously existed, as to what that word in legal phraseology means. [The Lord Justice read the definition.] Hence, if an action is brought by one who claims to enforce against an infant such an obligation, it is obvious that the plaintiff in order to prove his case must shew that the goods supplied come within this definition. That a plaintiff has to make out his case is, I should have thought, the first lesson that any one studying English law would learn; and the elaborate argument of Mr. McCardie that if you look at the authorities in the past, going back nearly a hundred years, you will find cases in which particular defendants might have taken a higher standpoint and insisted upon a right which they did not insist on does not appear to me to touch the plain and obvious conclusion that in order to succeed in the action the plaintiff must shew that he has supplied necessaries. That is to say, the plaintiff has to shew, first, that the goods were suitable to the condition in life of the infant; and, secondly, that they were suitable to his actual requirements at the time—or, in other words, that the infant had not at the time an adequate supply from other sources. There is authority to shew that this was the case even before the Act of 1893. In *Johnstone* v. *Marks* (1) this doctrine is laid down with the greatest clearness, and the ratio decidendi of that case applies equally to cases

(1) 19 Q. B. D. 509.

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since that Act. Therefore there is no doubt whatever that in order to succeed in an action for goods sold and delivered to an infant the plaintiff must shew that they satisfy both the conditions I have mentioned. Everything which is necessary to bring them within s. 2 it is for him to prove.

Passing on from general principles, let me take the facts of the present case. In my opinion they raise no point whatever as to the duty of the judge as contrasted with the duty of the jury arising from the peculiar character of the action. We have only to follow the lines of the law consistently administered by this Court for many more years than I can think of, an example of which as applied to the case of the supply of necessaries to an infant is given by the decision of the Court of Exchequer Chamber in the case of *Ryder* v. *Wombwell*. (1) Questions of law are for the judge; questions of fact are for the jury; but, as the Court there laid down, the particular question of fact in issue in such a case, like all other questions of fact, ought not to be left to the jury by the judge unless there is evidence upon which they could reasonably find in the affirmative. The issue in that case was whether certain articles were suitable to the condition in life of the defendant, the infant, and the Court of Exchequer Chamber thought that no jury could reasonably find that those articles were suitable to the condition of that defendant, and therefore they said that the judge—not by reason of any peculiar rule applicable to actions of this kind, but in the discharge of his regular duties in all cases of trial by a jury—ought not to have left the question to the jury because there was no evidence on which they could reasonably find for the plaintiff. We have before us a similar case, in which the issue is not only whether the articles in question were suitable to the defendant's condition in life, but whether they were suitable to his actual requirements at the time of the sale and delivery; and how does the evidence stand? The evidence for the plaintiff shewed that one of his travellers, hearing that a freshman at Trinity College was spending money pretty liberally, called on him to get an order for clothes, and sold him within nine months goods which at cash prices came

(1) L. R. 4 Ex. 32.

to over 120*l.*, including an extravagant number of waistcoats and other articles of clothing, and that is all that the plaintiff proved. The defendant's father proved the infancy, and then proved that the defendant had an adequate supply of clothes, and stated what they were. That evidence was uncontradicted. Not only was it not contradicted by any other evidence, but there was no cross-examination tending to shake the credit of the witness, against whose character and means of knowledge nothing could be said. On that uncontradicted evidence the judge came to the conclusion, to use the language of the Court in *Ryder* v. *Wombwell* (1), that there was no evidence on which the jury might properly find that these goods were necessary to the actual requirements of the infant at the time of sale and delivery, and therefore, in accordance with the duty of the judge in all cases of trial by jury, he withdrew the case from the jury and directed judgment to be entered for the defendant. In my opinion he was justified by the practice of the Court in so doing, and this appeal must be dismissed.

BUCKLEY L.J. The defendant, having been at school at Uppingham, went as a freshman to Trinity College, Cambridge, in October, 1902. The plaintiff, who was a tailor carrying on business in Savile Row, sent a traveller to Cambridge to solicit orders. The traveller has stated in evidence that he was told there was a young man spending money there very freely, so he called upon him. At first he got no order, but he pressed for orders, and subsequently got orders, with the result that between October 29, 1902, and June 16, 1903, the defendant had run up a bill of 145*l.* odd for clothing of an extravagant and ridiculous style having regard to the position of the boy. The tailor now sues the defendant for 145*l.* The defence is infancy. That action is brought in contract. I understand the law before 1874 to have been this: an infant could contract, and under some circumstances the infant could enforce the contract, although it could not be enforced against him—e.g., *Farnham* v. *Atkins*. (2) At common law, irrespective of statute, the contracts of an infant were voidable except such as were necessarily

(1) L. R. 4 Ex. 32. (2) (1670) 1 Siderfin, 446.

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to his prejudice; these last were void. Speaking generally, the consequence of the infant's contract was that inasmuch as he was an infant the contract (with the exception of certain contracts) could not during infancy be enforced against him, but when he came to majority he might, if he pleased, ratify and confirm it, and if he did so both parties were bound. The obligation was in contract, but contract of such a kind that as against the infant at any rate it could not be enforced. It was a voidable contract. In that state of things the Act of 1874 was passed. That Act relates to certain contracts and renders them for the first time void. The classes of contract which are not referred to in the Act remain as they were before. The Act of 1874 provides that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void," subject to a certain proviso which mentions voidable contracts. The contract for necessaries therefore is excepted and is left as a contract which is not void. The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although he was an infant, had a limited capacity to contract. In order to maintain his action the plaintiff must prove that the contract sued on is within that limited capacity. The rule as regards liability for necessaries may, I think, be thus stated: an infant may contract for the supply at a reasonable price of articles reasonably necessary for his support in his station in life if he has not already a sufficient supply. To render an infant's contract for necessaries an enforceable contract two conditions must be satisfied, namely, (1.) the contract must be for goods reasonably necessary for his support in his station in life, and (2.) he must not have already a sufficient supply of these necessaries. The defence that the goods were not necessaries will be made out by shewing either that in what I may call their innate quality, having regard to the position in life of the defendant, they were such that he could not want them, or that,

supposing the goods were capable of being necessaries, he had already enough, so that he did not want them. If in the action it is put in issue that the goods supplied were not necessaries on those two grounds, or on either of them, the onus is on the plaintiff to shew that they are necessaries. He is suing upon a contract which the defendant cannot make except under defined circumstances, and it is for him to shew that the defined circumstances enabling the infant to contract existed. What took place here was this. The plaintiff called his traveller, who gave evidence as to the goods supplied. At the conclusion of that evidence Mr. Atkin, for the defendant, submitted that, subject to his proving that the defendant was an infant, there was no evidence to go to the jury. He put the father in the box to prove the infancy, and then he put some further questions to the witness addressed to the point whether the boy was already sufficiently supplied with clothing, and the evidence of the father on that point was taken. The question whether or not the boy already had a sufficient supply of clothes is not a question of law, but a question of fact, and of course all questions of fact are for the jury. No doubt in these cases involving the question whether the goods are necessaries or not it is difficult to draw the line between law and fact. As regards the position in life of the boy you must have evidence, and it may be that you cannot even determine whether the article from its innate quality is capable of coming under the head of necessaries until you know what his station in life is. Therefore to enable the judge to determine as a question of law whether the goods are such as are capable of being in law necessaries some evidence is required. But certainly the issue whether the defendant was already adequately supplied or not was a question of fact and was for the jury. The doubt I have in this case is whether at the conclusion of the evidence the judge ought to have left the matter to the jury with a direction that they ought to find their verdict in a particular way, or whether he ought to have withdrawn it as he did. Perhaps the more regular course would have been for the judge to have directed the jury to find for the defendant on the ground that there was no evidence to justify a verdict for the plaintiff. It does not matter much

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which way it is put. I arrive at the conclusion in point of fact that there was no evidence to go to the jury to satisfy the affirmative that these goods were necessaries, and consequently I think that the judge was right in directing judgment to be entered for the defendant.

Appeal dismissed.

Solicitors: *Carter & Bell; Philpot, Morrell & Hughes.*

H. B. H.

C. A. 1908 *March* 27.

[IN THE COURT OF APPEAL.]

WEST *v.* BRISTOL TRAMWAYS COMPANY.

Nuisance—Creosote used in paving Road—Tramway Company—Damage to Plants in adjoining Land—Knowledge—Statutory Authority—Exceptional use of Land.

The defendants, a tramway company, who were by their special Act under an obligation to pave certain parts of a road, on which their tramway was laid, with wood paving, used for that purpose wood blocks coated with creosote. The fumes given off by the creosote injured plants and shrubs belonging to the plaintiff, a market gardener, whose premises were near the road. There was another kind of wood paving in use which the defendants might have used, and which could not have caused injury to the plaintiff's plants and shrubs. In an action by the plaintiff in respect of the damage caused as above mentioned, the jury found that it was reasonably necessary for the defendants to pave the road as they did according to their knowledge at the time, but that in the light of the evidence given at the trial it was not reasonably necessary:—

Held (affirming the decision of a Divisional Court), that the defendants were not authorized by their special Act to use the particular kind of wood paving which they had used, and that, although they did not know that the use of creosoted wood might cause damage, and were not guilty of negligence, they were, upon the principle laid down in *Fletcher* v. *Rylands*, (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330, liable to the plaintiff in respect of the damage sustained by him.

APPEAL from the judgment of a Divisional Court (Phillimore J. and Walton J.) dismissing an appeal from the judgment of the Recorder of Bristol, acting as judge of the Tolzey Court of Record at Bristol, in an action tried by him with a jury.

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The plaintiff, a market gardener, sued the defendants to recover damages for injury alleged to have been caused to plants and shrubs belonging to the plaintiff through the fumes given off by creosoted wood pavement which had been laid by the defendants upon a road adjacent to the plaintiff's premises. The defendants in their defence denied that the injury had been occasioned as alleged, and pleaded that they were authorized to lay the pavement as they had done by the terms of their special Act, the Bristol Tramways Act, 1894 (57 & 58 Vict. c. clv.). By s. 8 of that Act it was provided that "the company shall pave with wood, or, by mutual agreement, with other suitable material, to the satisfaction of the corporation, (*a*) so much of," among other specified roads, the road in question "as lies between the rails of the tramways in the said respective roads, and so much of the roadway as extends eighteen inches beyond the rails of and on each side of such tramways, and also (where double lines are or shall be laid on those roads) the portion of the roadway between such double lines."

Evidence was given at the trial to the effect that there were two modes of wood paving which had been in general use for several years, in one of which blocks of a hard wood called "Jarrah wood" were used, and in the other blocks of softer wood coated with creosote. Evidence was also given to shew that the latter method was more suitable for the purpose of paving in the locality where the pavement in question was laid, owing to the fact that it was damp, and Jarrah wood was apt to expand under the influence of moisture. There appeared from the evidence to be reason to think that the injury to the plaintiff's plants and shrubs from the fumes of the creosote was dependent upon the time of year when the paving was done, and that, if the paving operations had been carried out at another time of the year, no such injury would have been caused. The jury found, in answer to questions left to them by the recorder, that the injury to the plaintiff's plants and shrubs was caused by the wood paving used by the defendants; that it was not absolutely necessary for the defendants to pave the road as they did, and at the time they did; and that it was reasonably necessary for them to pave the road as they did, and at the time they did,

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according to the knowledge of the defendants at the time, but that in the light of the evidence given at the hearing it was not reasonably necessary.

On these findings the recorder gave judgment for the plaintiff. The Divisional Court affirmed his judgment. (1)

(1) The judgments of the learned judges in the Divisional Court were as follows:—

PHILLIMORE J. In my opinion this appeal must be dismissed. The plaintiff founds his action on the old maxim "Sic utere tuo ut alienum non lædas." The defendants, for the purpose of repairing a road under their control, have put down wood pavement consisting of creosoted beech blocks; and the plaintiff alleges, and the jury have found, that either material particles or gases or effluvia escaped from the blocks, and injured or destroyed the plants and flowers growing in the plaintiff's nursery garden. It is admitted that there is evidence to support that finding of the jury. In these circumstances the onus is on the defendants to justify the use of this particular kind of wood pavement; but, where a man uses his land or his chattel in such a way as to injure his neighbour's property, it is not a justification to say that he had no intention of causing the injury complained of, or that he did not know, or even that there was no reason why he should know, that the injury would be caused. In the present case the defendants say that they have a statutory justification for what they did. Now, if Parliament authorizes a thing to be done, and mischief results from the doing of the very thing authorized, the person injured has no redress. Further, if there is only one way of doing the thing which Parliament has authorized, then Parliament must be taken to have authorized the doing of the thing in that way, just as much as if that particular way had been expressly authorized. But it is not necessary that there should be express authority; the intention of the Legislature must be ascertained from the language which has been used. The question therefore ultimately comes to this, What is it that Parliament has authorized? Here, Parliament has authorized the repair of the road by paving certain portions of it with wood, and any mischief which results from that, such as the blocking of the road, injury to tradesmen, or noise, must go without redress. If there was only one kind of wood pavement known, that kind would be the one authorized; but there are two kinds, one being soft wood with creosote, and the other being hard wood without creosote. The defendants contend that there are many advantages in using the soft wood with creosote, but they cannot shew that it is the only kind of wood paving, and, therefore, although they can plead a statutory authority to use wood paving, they cannot shew any authority for the use of creosote in connection with the wood paving. Creosote is like the wild animals in the old cases, the water in *Fletcher* v. *Rylands* ((1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330), and the electric fluid in *National Telephone Co.* v. *Baker* ([1893] 2 Ch. 186), and, if the use of creosote is dangerous, the defendants have no authority to use it, and on that short ground

March 27. *Clavell Salter*, K.C., and *B. R. Vachell*, for the defendants. It must be taken on the findings of the jury that alone this action in my opinion must succeed.

I will now consider the findings of the jury. The jury have found that the injury to the plaintiff's plants was caused by the wood paving used by the defendants, and that it was not absolutely necessary for them to pave the road as they did at the time they did it. I think that, if those two findings stood alone, the plaintiff would clearly be entitled to have the verdict entered for him; but, in answer to a further question, the jury found that it was reasonably necessary for the defendants to repave the road in the way they did, and at the time they did, according to the knowledge of the defendants at the time, but that in the light of the evidence given at the hearing it was not reasonably necessary. The defendants can only justify the use of creosote under their statutory powers, by saying that Parliament must be taken to have intended that they should use creosote, because the only practical way of carrying out wood paving is to use creosote. I think the jury by their last finding meant to say that the defendants acted reasonably in using creosote having regard to their knowledge at the time; but that finding does not in my opinion enable the defendants to escape liability, if creosote is in fact a dangerous thing, and if the defendants were not authorized by their statutory powers to use it. The jury have found that creosote is a dangerous thing, and the fact that there is an alternative method of carrying out wood paving, which does not necessitate the use of creosote, shews that the defendants were not authorized by statute to use it. For these reasons I am of opinion that this appeal must be dismissed.

WALTON J. I am of the same opinion. The jury have found that the injury to the plaintiff's plants was caused by the wood paving used by the defendants; in other words, that creosoted wood is of such a nature that, if used in paving a road, it may cause injury to an adjoining garden. That being so, the rule in *Fletcher* v. *Rylands* applies, and the defendants are liable at common law for the damage which has resulted from the use of creosote. The defendants contend that they are protected by s. 8 of the Bristol Tramways Act, 1894, which directs them to pave the road in question with wood paving. If the Act had said that they should pave with creosoted wood, the case would have been entirely different, and the defendants would only have been liable if they had failed to use reasonable care and skill to avoid injury to the adjoining landowners. No case of negligence has been made against the defendants, and the question therefore is, are they liable apart from negligence? It seems to me that they are liable on the principle of *Fletcher* v. *Rylands*, unless they are protected by the statute, and in my opinion they are not protected by the statute, unless it has expressly authorized them to use creosote. I use the word "expressly" in the same sense as my brother Phillimore used it, that is to say, it is not necessary that the Act should in terms mention creosote, but the work authorized by Parliament must necessarily involve the

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there was no negligence on the part of the defendants. The first question, therefore, is whether, independently of negligence, and any question of statutory authority, there was any cause of action against the defendants at common law. The case has been treated in the Court below as coming within the doctrine of *Fletcher* v. *Rylands* (1), but that case was not analogous to the present. There a large quantity of water had been brought on to land, and impounded in a reservoir; and it is obvious to every one that a large volume of water so impounded is a dangerous agent, and, if the water is allowed to escape, mischief will be done. The principle of that case is that, where an owner of land alters the natural state of things by bringing upon the land an agent known to be dangerous, he is liable for the consequences of its

use of creosote. The point is, I think, well illustrated by comparing *Vaughan* v. *Taff Vale Ry. Co.* ((1860) 5 H. & N. 679) with *Jones* v. *Festiniog Ry. Co.* ((1868) L. R. 3 Q. B. 733). In *Vaughan* v. *Taff Vale Ry. Co.*, as stated by Blackburn J. in *Jones* v. *Festiniog Ry. Co.* (L. R. 3 Q. B. 733, at p. 737), "the company were expressly authorized by s. 86 of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20) to employ locomotive engines as a motive power for their carriages, and therefore to use and carry the fire along the railway, and the decision of the Exchequer Chamber was that this express authority of the Legislature took the case out of the operation of the common law, and legalized the use of the dangerous engines, subject to the condition that the company took all reasonable precautions, and if, in spite of these precautions, sparks escaped, the company were not liable for the consequences." That is a case, therefore, where the dangerous thing was used by the express authority of Parliament. *Jones* v. *Festiniog Ry. Co.* is an example of the other class of case, for there, as Blackburn J. pointed out (L. R. 3 Q. B. 738), "at the most the statute authorizes the making of a railway and the drawing of carriages along it by some means or other, and does not prohibit the use of locomotive engines for this purpose; but there is nothing to authorize the use, so as to relieve the company from their liability to the consequences at common law of using them"; and in an earlier passage in the same judgment (L. R. 3 Q. B. 736) Blackburn J. said: "Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and, if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part." I think the present case falls within the principle of *Jones* v. *Festiniog Ry. Co.* and not within *Vaughan* v. *Taff Vale Ry. Co.*, and that the plaintiff is, on the findings of the jury, entitled to judgment.

(1) L. R. 1 Ex. 265; 3 H. L. 330.

escape. It is like the case of a beast of a dangerous character, the owner of which keeps it at his peril, and is liable for any damage which may arise from its escape. The evidence here was that creosoted wood had been in use for several years for the purpose of wood paving, and no mischief had ever been known to arise from it. This case is therefore that of using for the purpose of paving a road, as directed by a statute, a substance not known to be dangerous. The case is analogous to that of keeping an animal like a dog, which is presumably of a harmless character, and for injury inflicted by which the owner is not responsible, unless the plaintiff proves that he knew the particular animal to be dangerous. [They cited on this point *Crowhurst* v. *Amersham Burial Board.* (1)]

Secondly, the defendants are protected from responsibility by the provisions of their special Act. They are bound by the Act, in the absence of an agreement with the corporation for the use of any other material, to pave the road with wood; and it is submitted that, on the true construction of the Act, they are authorized to use any sort of wood paving which, in the exercise of a reasonable discretion, they may think under the circumstances best. [They cited on this point *Vaughan* v. *Taff Vale Ry. Co.* (2); *Jones* v. *Festiniog Ry. Co.* (3); *National Telephone Co.* v. *Baker* (4); *Harrison* v. *Southwark and Vauxhall Water Co.* (5)]

Inskip, for the plaintiff, was not called upon to argue.

LORD ALVERSTONE C.J. I have listened carefully to the arguments of the defendants' counsel, but they have not succeeded in raising in my mind any serious doubt as to the correctness of the judgment of the Divisional Court.

I will deal first with the point, which was most strongly pressed upon us, that, apart from any question of statutory authority, the plaintiff had no common law right of action against the defendants. In my opinion the proposition of law applicable to this case is correctly stated in Garrett on Nuisances, 2nd ed. p. 129; and I will read that statement as part of my judgment, as, in my

(1) (1878) 4 Ex. D. 5.
(2) (1860) 5 H. & N. 679.
(3) (1868) L. R. 3 Q. B. 733.
(4) [1893] 2 Ch. 186.
(5) [1891] 2 Ch. 409.

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opinion, the law on the subject could not be more clearly expressed. It is as follows: "Where the owner of land uses his land for any purpose for which it may in the ordinary course of enjoyment of land be used, he will not, in the absence of negligence on his part, be liable, though damage result to his neighbour in the ordinary enjoyment by the latter of his property; for it lies with the latter to protect himself from the operation of natural laws. But, if the owner of land uses it for any purpose which from its character may be called non-natural or extraordinary user, such as, for example, the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land from its escape, or if the latter's legitimate enjoyment of his land is thereby materially curtailed." If the contention of the defendants' counsel in this case is correct, this last proposition is stated much too widely; for they contend that the owner of land who has so acted has not done so at his peril, and is not liable, unless the plaintiff shews that the thing introduced on to the land was, to the knowledge of the defendant, likely to escape and cause damage. The authorities do not, in my opinion, support the suggestion that this onus is cast on the party injured. The nearest approach to authority in favour of the defendants' contention is to be found in cases where it has been said, with regard to tame animals, that, where such an animal is allowed to escape, its owner would only be liable for some, and not for all, of the damage which it might cause; for instance, if the natural food of the animal was grass, he would be liable for the grass it might trample down or consume, but not for injury to a person through its biting or goring him: see per Blackburn J. in *Fletcher* v. *Rylands*. (1) But the principle on which those authorities depend does not really support the contention of the defendants' counsel, as may be seen from the judgment of Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co.* (2), which, substantially, stated the law on the subject in the same way as Lord Esher M.R. in that case had done. He there said: "If from the experience of mankind a particular

(1) L. R. 1 Ex. 265, at p. 280. (2) (1890) 25 Q. B. D. 258, at p. 261.

class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief." In order to bring this case within that proposition, the defendants' counsel must shew that the thing which the defendants introduced on to the land in this case was something which, according to the common experience of mankind, had proved not to be dangerous, or likely to cause mischief. In such a case the onus of proof rests upon the defendants. It may perhaps be doubtful whether this doctrine with regard to the common experience of mankind applies to chemicals, but, assuming that it does, there was no evidence in this case that, according to the common experience of mankind, creosote was not likely to cause mischief such as in this case it must be taken to have caused. It is clear that it is not, for this purpose, the knowledge of a particular witness that is to be considered, but the common experience of mankind in general. As to the first point, namely, that the defendants have no need to rely on any statutory authority, in my opinion the appeal fails. It seems to me that the case comes within the second proposition which I have quoted from Garrett on Nuisances, and that the defendants, having introduced upon the road in question something the use of which may be said to constitute a non-natural or extraordinary user of the land, have done so at their peril, and are, apart from any statutory justification for their action, liable for the mischief which has resulted to the plaintiff.

That being so, the question arises whether the defendants are protected from any liability by statute. It is, of course, established law that, if a statute has, either expressly, or by necessary implication, authorized the doing of a particular thing, no action will, in the absence of negligence in the mode of doing it, lie in respect of damage thereby caused. In *Vaughan* v. *Taff Vale Ry. Co.* (1) Cockburn C.J. said :—"Although it may

(1) 5 H. & N. 679, at p. 685.

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be true, that, if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument, yet when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that, if damage results from the use of such thing, independently of negligence, the party using it is not responsible." Then did the words of the statute in the present case authorize the defendants to do what they have done? The statute provides that they shall pave with wood, or (by mutual agreement) with other suitable material, to the satisfaction of the corporation so much of, among other roads, the road in question as lies between the rails of their tramways and as extends eighteen inches beyond the rails of and on each side of such tramways. In my opinion that provision does not authorize the defendants to pave the specified portion of the road with creosoted wood. If the Legislature had meant to say that the defendants might use any kind of wood pavement, and therefore that, whatever consequences might ensue therefrom, they should not, in the absence of negligence, be responsible, I think different language would have been used. The obligation placed upon them is to use wood pavement, but not to use a particular kind of wood pavement which is dangerous. There was some suggestion that at another time of the year the use of creosoted wood could not be mischievous, but, however that may be, the jury in this case must be taken to have found that the use of it, as and when it was used, did cause damage through the fumes arising from it. For these reasons I think that the contention that the plaintiff had no right of action at common law, and the contention that the defendants were authorized by statute to do what they did, both of them, fail, and therefore the appeal must be dismissed.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion. The contention of the defendants' counsel that the plaintiff had no right of action at common law appears to me to be

untenable for the reasons given by the Lord Chief Justice, which I need not any further elaborate. That being so, the only remaining question is whether the statute to which we have been referred affords the defendants any defence. The argument for the defendants has failed to satisfy me that, upon the true construction of the statute, it authorized them, either expressly or by necessary implication, to make use of creosoted wood: by this I mean, either in express terms, or by authorizing works which must necessarily involve the use of creosoted wood. Upon this point I agree entirely with the judgments given in the Divisional Court.

FARWELL L.J. As regards the construction of the statute I agree, and I adopt the judgments in the Divisional Court, particularly that of Walton J. On the other point, which was the one mainly urged upon us, it seems to me that, in the class of cases to which *Fletcher* v. *Rylands* (1) belongs, the essential element underlying the decisions is that the damage was there occasioned by a non-natural use of the defendant's land. This is illustrated by what Bramwell J. said in *Bamford* v. *Turnley*. (2) Speaking of the exception of certain cases from the rule "Sic utere tuo ut alienum non lædas," he said: "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, namely, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of

(1) L. R. 1 Ex. 265; 3 H. L. 330. (2) (1862) 3 B. & S. 62, at p. 83.

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his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live." For instance, annoyance may be caused to my neighbour by what is done in repairing my house in one year, and he in turn will cause me similar annoyance in another year. But the same considerations do not apply to a non-natural or extraordinary user of land. Putting aside any question of a statutory justification, the defendants have to justify the bringing on to the road of creosoted wood, the fumes of which have, as the jury have found, injured the plaintiff's property. For that purpose they have to shew that the case comes within the exception mentioned by Blackburn J. in *Fletcher* v. *Rylands*. (1) The learned judge there (2) lays it down that a person who brings on his land anything that was not naturally there, and that is likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is prima facie liable for all the damage which is the natural consequence of its escape. For example, if he brings an animal on to his land, he is bound to keep it in; but, if it escapes, he is not liable for every consequence of its escape, but only for the consequences which are natural according to the common experience of mankind, as for instance, with regard to tame beasts, for the grass they eat and trample upon, not for any injury to the person of others; for, says the learned judge, "our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but, if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too." Dealing with the question of damage done by animals, Lord Esher M.R. in *Filburn* v. *People's Palace and Aquarium Co.* (3) put the matter thus. He said: "The law of England recognizes two distinct classes of animals; and, as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are

(1) L. R. 1 Ex. 265. (2) L. R. 1 Ex. 279, 280.
(3) 25 Q. B. D. 258, at p. 260.

not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous." Then, after saying that there are some animals which every one must recognize as not being dangerous on account of their nature, and others which the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others, he proceeds thus: "I take it this recognition has come about from the fact that, years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions—that is, unless it is shewn to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is that a man who keeps one must take the responsibility of keeping it safe." The assumption of which Lord Esher speaks is common knowledge founded on common experience of common things, and appears to me to have no application to chemicals, which can hardly be said to be matters within the common experience of mankind, and as to which the knowledge even of experts is constantly growing and varying. Lord Esher was referring to the ordinary man and ordinary things, not to the experience of experts in technical matters. Moreover in this case it was not proved that according to common experience creosoted wood was not likely to cause the mischief which occurred in the present case. For these reasons I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Whites & Co., for J. Inskip & Son, Bristol.*

Solicitors for defendants: *Stanley, Wasbrough and Doggett, Bristol.*

E. L.

1908
March 28

[CROWN CASE RESERVED.]

THE KING *v.* CONNOR.

Criminal Law—Cruelty to Children—Custody of Child—Parent living apart from Wife—Wilful Neglect of Child in Manner likely to cause unnecessary Suffering or Injury to Health—Omission of Parent to send any Part of Earnings for Support of Child—Prevention of Cruelty to Children Act, 1904 (4 *Edw.* 7, *c.* 15), *s.* 1, *sub-s.* 1.

A parent cannot, by leaving his wife and living apart from her, divest himself of the custody of his child so as to free himself from liability to conviction for an offence under s. 1 of the Prevention of Cruelty to Children Act, 1904; and if while so living apart from his wife he wilfully neglects his child in a manner likely to cause it unnecessary suffering or injury to its health, he will be guilty of a misdemeanour under the section.

The mere omission of the parent to pay any part of his earnings towards the support of his child may constitute wilful neglect within the meaning of the section.

Case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by Ridley J.

The prisoner was tried at the Liverpool Winter Assizes on an indictment under s. 1 of the Prevention of Cruelty to Children Act, 1904. (1) The first count of the indictment charged the prisoner that he, being a person over the age of sixteen years and having the custody of one Mary Catherine Connor, a child of seven years of age, did between February 7 and November, 1907, unlawfully and wilfully neglect such child in a manner likely to cause it unnecessary suffering and injury to its health. There were three other similar counts relating to younger children of the prisoner.

The following facts were proved in evidence:—

On February 9, 1907, the prisoner, after having for some time

(1) Prevention of Cruelty to Children Act, 1904, s. 1, sub-s. 1: "If any person over the age of sixteen years, who has the custody, charge or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight or hearing or limb or organ of the body and any mental derangement), that person shall be guilty of a misdemeanour. . . . ."

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lived apart from his wife, went to live with her again at Great Richmond Street, and continued to do so until April 5, 1907. For the first three weeks of that period the prisoner gave his wife about 15*s.* per week for the maintenance of herself and five children. These were the only payments he ever made towards the support of his wife and children up to his arrest on November 6, 1907. The payments were insufficient to keep the five children in food, but an aunt of the prisoner's wife, who lived a few doors off, provided some meals almost every day for three of the children. The prisoner was then earning about 25*s.* a week in the employment of the Liverpool Corporation. On April 5 the prisoner left his wife, and from that date continued to live apart from her. On three occasions after that date the prisoner's wife met him, but did not ask him for any money because she was afraid of his beating her, as he had once seized her and shaken her so hard that she had to call a policeman. Between April 5 and November meals had, as before when prisoner lived with his wife, been frequently provided by the same aunt for the children; but in spite of that fact the prisoner's wife said the children "have barely had enough with the help of the aunt—without it we must have gone to the workhouse."

An inspector of the Liverpool Society for the Prevention of Cruelty to Children stated that on October 12 and 19, when he saw these children, "they were very clean but insufficiently clad, and looked poorly fed; there was very little in the house." The prisoner did not give evidence, but his statement on oath at the police court was put in by the prosecution, and it was read to the jury, omitting immaterial facts. It was as follows: "This is the sequel to a family quarrel. This woman has been in the habit of doing servant's work at her aunt's house at the time my children were very small. I've left the woman, and if the children are neglected it is her look out, and not mine."

Cross-examined by the prosecuting solicitor: "I decline to say where I have been working during the last seven months, and I decline to say what money I have been earning during that time. I have been living at Bevington House. I have paid 6*d.* a night there and had my meals out. I paid for that out of the money I

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earned. I sent no money that I earned to help to support my children. I inquired of the children as to whether they were being fed and clothed. I made inquiries only of the eldest one. I asked her where she was living. She told me Great Richmond Street. I knew the house. I asked her how the other children were doing. They were all right, she said, at her aunty's. I thought a money-lender named Harvey was supporting my children. He lives in Great Richmond Street, and I was under the impression that my wife was living with him. I have seen her going into his house. My wife had to seek police protection owing to my violence. I do not think she was wanting protection from me when she went into the man Harvey's house. My wife got a separation order last January or February. In February I persuaded her to come back to me. I had got a job in the corporation, and kept it about two months. I was working at Breeze Hill. I then went to the docks and got casual work. Walter Nelson, Bath Street, and Morgan, Preeson's Row, employed me two or three days a week at 4*s*. 6*d*. per day. I have been in better employment since, but I decline to say what my wages were then. I refuse to say when I came back from Hamburg In October I was working nowhere. On my arrest I had 2*l*. 19*s*. 10½*d*. I received it three weeks before. It was not an army pension. I did not send any of it to my wife. About October 15 last I inquired from my eldest child as to the condition of the children."

The jury found the prisoner guilty, and the judge passed a sentence of three months' hard labour, but the prisoner was liberated on bail.

The questions for the opinion of the Court were:—

1. Had the prisoner "the custody of the children" within the meaning of the Prevention of Cruelty to Children Act, 1904?

2. Was the mere omission of the prisoner to pay any part of his earnings to his wife wilful neglect likely to cause unnecessary suffering and injury to the health of the children?

If the Court should answer either of the above questions in the negative, the conviction was to be quashed; otherwise the conviction was to be affirmed.

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Maxwell, for the prosecution. The prisoner cannot set up the fact that he has deserted his wife in order to escape liability under the statute. He still has, in law, the custody of the children.

With regard to the second question, it is clear that the mere omission to send money would have been an offence under s. 37 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), which made it an offence for a parent to wilfully neglect to provide adequate food for his child being in his custody so that its health should be likely to be seriously injured. The Prevention of Cruelty to, and Protection of, Children Act, 1889 (52 & 53 Vict. c. 44), s. 1, the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1, and the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 1, made it an offence to wilfully neglect in a manner likely to cause unnecessary suffering. But, as Lord Russell of Killowen C.J. pointed out in *Cole* v. *Pendleton* (1) (where the facts were the same as in the present case, except that the prisoner was living with his wife), it was not to be supposed that by the Prevention of Cruelty to, and Protection of, Children Act, 1889, which repealed s. 37 of the Poor Law Amendment Act, 1868, it was intended that an offence clearly punishable under that section should not be so under the later Act, it being entitled an Act for the better protection of children. The Act of 1889 was repealed and substantially re-enacted by the Prevention of Cruelty to Children Act, 1894, which was repealed and substantially re-enacted by the Prevention of Cruelty to Children Act, 1904.

The prisoner did not appear, nor was he represented by counsel.

LORD ALVERSTONE C.J. I am of opinion that the conviction must be affirmed. The statutes dealing with the subject make the matter clear. Before the year 1889 it was provided by the Poor Law Amendment Act, 1868, s. 37, that "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been

(1) (1896) 60 J. P. 359.

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or shall be likely to be seriously injured, he shall be guilty of an offence."

It is obvious that the intention of the Legislature as early as 1868 was to make a parent who neglected to provide adequate [food] for his children in his custody amenable to the criminal law. Sect. 37 of the Poor Law Amendment Act, 1868, was repealed by s. 18 of the Prevention of Cruelty to, and Protection of, Children Act, 1889, which by s. 1 enacted that any person "over sixteen years of age who, having the custody, control, or charge of a child, ... wilfully ill-treats, neglects, abandons, or exposes such child, ... in a manner likely to cause such child unnecessary suffering, or injury to its health," should be guilty of a misdemeanour. The Act of 1889 was repealed by the Prevention of Cruelty to Children Act, 1894, under which *Cole* v. *Pendleton* (1) was decided. Sect. 1 of the Act of 1894 was substantially the same as s. 1 of the Act of 1889. The Act of 1894 was repealed by the Prevention of Cruelty to Children Act, 1904, under which this prosecution was instituted. Sect. 1 of the Act of 1904 re-enacts the provisions contained in s. 1 of the Act of 1894. In *Cole* v. *Pendleton* (1) it was pointed out by Lord Russell of Killowen C.J. that it could not have been intended when the Act of 1889 was passed that there should be no means of punishing an offence which would have been within the express terms of s. 37 of the Act of 1868, especially having regard to the title of the Act of 1889, which was "An Act for the Prevention of Cruelty to, and better Protection of, Children." In the present case the only ground upon which it can be urged that the prisoner did not have the actual charge of the children was that he had abandoned them. Sect. 1 of the Act of 1904 deals also with the case of a person who has the custody, charge, or care of any child under the age of sixteen. Therefore all those three cases are met. It was clearly the intention of the Legislature to keep alive the former remedy against the parent who has the custody of the child. In *Cole* v. *Pendleton* (1) the objection was taken that as civil proceedings could be taken against the parent criminal proceedings would not lie. But Lord Russell of Killowen C.J. pointed out that it could not have been intended that criminal

(1) 60 J. P. 359.

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proceedings should not lie, as it was clearly intended to punish that which was constituted an offence by the Poor Law Amendment Act, 1868. Can it be seriously contended that the parent in the present case had not the custody of the children? If that contention were upheld, it would follow that the prisoner, by living where he ought not to live, could get rid of the custody of his child.

As to the second point, that was in fact decided in *Cole* v. *Pendleton*. (1) But even if it was not, the question was rightly left to the jury in the present case. If in fact some other benevolent person had provided for the children sufficient food a different state of things would have arisen. But in the present case the fact was that the children were half starved, although not wholly starved. It is no answer to the charge to say that some person prevented them from being wholly starved.

GRANTHAM J. I entirely approve of the decision in *Cole* v. *Pendleton*. (1) It is clear that upon the facts the conviction of the prisoner in that case was right. But the question is whether the present case comes within the principle of that decision. The two cases are not identical. In the present case the aunt had for a considerable time been providing food for these children. The statement of the prisoner was to the effect that when the children were young his wife worked as servant to her aunt, and he evidently thought that she was neglecting him. The question is whether the mere omission of the prisoner to pay any part of his earnings to his wife was wilful neglect likely to cause unnecessary suffering and injury to the health of the children. If it had not been for the finding of the jury—if the question had been put to us alone—I should have had a difficulty in saying that the mere omission of the prisoner to send any part of his earnings to his wife necessarily constituted wilful neglect within the meaning of the statute. But all the facts were before the jury. The children had barely sufficient food, and, the jury having found that the omission of the prisoner to send the money was wilful neglect likely to cause unnecessary suffering and injury to the health of the children, I cannot say that their finding is wrong.

(1) 60 J. P. 359.

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But in the absence of that finding I should have hesitated to say that the mere omission to send the money necessarily amounted, as a matter of law, to wilful neglect within the meaning of the statute.

LAWRANCE J. I entirely agree with the judgment of Lord Alverstone C.J.

RIDLEY J. I also agree. When the case was before me I thought that the second question was one of importance, namely, whether the mere omission of the prisoner to pay any part of his earnings to his wife constituted wilful neglect "likely to cause . . . . unnecessary suffering or injury to" the "health" of the children within the meaning of the statute. I was conscious of the existence of an opinion that the statute contemplated some direct interference with the supervision of the children. It was upon that point that I wished to reserve a question for the opinion of this Court.

PICKFORD J. I concur.

Conviction affirmed.

Solicitors for prosecution: *F. Venn & Co., for E. R. Pickmere, Town Clerk, Liverpool.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1908
March 17, 18.

CORPORATION OF LIVERPOOL *v.* PETER WALKER & SON, LIMITED.

Licensing Acts—Extinction of Licence—Compensation—Division among Parties interested—Principle of Computation—Determination by County Court—Appeal—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where, under s. 2, sub-s. 3, of the Licensing Act, 1904, the quarter sessions having referred the division of the sum fixed as compensation to be paid for the extinction of a licence among the persons interested in the licensed premises to the county court, and the amount to be received thereout by the licence-holder having been settled by agreement between the parties, the residue had to be apportioned between the lessees of the premises for a term of years, who were brewers, and the freeholders, which apportionment the county court judge made on the basis of the 8 per cent. interest table :—

Held (reversing the judgment of a Divisional Court), that there was no rule or presumption of law, either general or applicable to the circumstances of the particular case, by which the county court judge was bound to treat the respective interests of the parties as 4 per cent. investments, or to adopt the 4 per cent. interest table for the purpose of making the division; that the valuation of the respective interests in the compensation money was entirely a question of fact to be determined by him upon the circumstances of the particular case; and that his determination of that question was not subject to review by the High Court.

Quære, whether in such a case there is any right of appeal from the county court judge.

Appeal from the judgment of a Divisional Court (Phillimore J. and Walton J.), reported [1908] 1 K. B. 28, in an appeal from a decision of the judge of the Liverpool County Court.

Peter Walker & Son, Limited, brewers, were tenants to the corporation of Liverpool of a beer-house situate at 8, Bridgwater Street, Liverpool, under a lease for a term of seventy-five years from March 4, 1852, at a peppercorn rent. The lease contained a covenant to repair, but no covenant to keep the licence on foot. The house was sub-let by Peter Walker & Son to one Ann Jordan, the licence-holder, upon the terms of the usual covenant binding her to sell no liquors upon the premises other than those of her immediate lessors. In 1906 the licence was extinguished

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under the provisions of the Licensing Act, 1904, and in January, 1907, the Commissioners of Inland Revenue determined the amount of the compensation for non-renewal of the licence payable to the parties interested in the licensed premises at 603*l.* The division of that amount between the licence-holder, Peter Walker & Son, and the corporation was referred by the compensation authority to the county court. It was agreed between Peter Walker & Son and the corporation that 75*l.* should be paid to the licence-holder by them rateably out of the shares to which they should be held to be entitled, and the only question in dispute before the county court judge was as to the proportion in which they, the lessees and lessors, were respectively entitled to share. The nature of the evidence given before the county court judge, and his decision thereon, appear from his judgment, which was as follows:—

"In this case I have to apportion the sum of 603*l.* found by the Inland Revenue Commissioners to be the amount payable in respect of the extinction of the licence of No. 8, Bridgwater Street. The parties among whom this sum has to be apportioned are the lessors (the corporation of Liverpool), the lessees (Messrs. Peter Walker & Son, Limited), and the tenant to Messrs. Peter Walker & Son. It has been agreed that this tenant is to receive 75*l.*, to be paid rateably by the other parties. I have, therefore, in the first instance to apportion 603*l.* between the lessors and the lessees. The house is an ante-1869 beer-house, and the lessees, who are brewers, hold it from the corporation of Liverpool on a lease of seventy-five years, of which twenty years were unexpired at the date of the extinction of the licence. Mr. Leslie Scott, who appeared for the lessors, contended that I was bound as a matter of law to divide the sum of 603*l.* between the lessors and the lessees in a proportion determined by an actuarial calculation based upon the 4 per cent. interest tables. Upon this basis he claimed that the lessors, as the reversioners of the lease upon which twenty years were to run, were entitled to 275*l.* in respect of their reversionary interest, and that the lessees, in respect of their twenty years' right of possession, were entitled to 328*l.* Mr. Scott based this contention upon the analogy of an apportionment between a tenant for life and

remainderman in the case of an ordinary freehold estate. Mr. F. E. Smith, for the lessees, contended that this method was inapplicable to the division of a capital sum paid in respect of the extinction of a licence, and that I was entitled to take into account the nature of the interest, the vicissitudes to which it was subject, the age and character of the house, and the fact that the lessees were under no obligation under their lease to maintain the licence or to surrender the premises with a licence. As it was assumed that this might be treated as a test case, it was agreed that evidence should be taken subject to a note being taken of objection to its reception. It is unfortunate that no information is supplied as to the factors taken into account by the Inland Revenue Commissioners in arriving at the amount of compensation fixed by them, and that I am deprived of the assistance this would have given me in making an equitable apportionment. I think, however, in the absence of any evidence to the contrary, that I must infer that the Inland Revenue Commissioners acted upon the assumption that but for extinction the licence would have continued, and that they took into account all matters which affected the value of the property as licensed property. I am bound to assume that 603*l.* represents the full difference in value as between the premises licensed and unlicensed. But I do not think that Mr. Scott's contention that the apportionment should be upon a 4 per cent. basis is correct. This would, I think, work an injustice, having regard to the nature of the interest to be compensated. As between a person entitled for twenty years to the enjoyment of an ordinary freehold estate worth 603*l.*, upon which the normal rate of interest is 4 per cent., and the reversioner, it is fair that the apportionment should be on a 4 per cent. basis. In such a case 328*l.* awarded to the person in present possession would, if invested at 4 per cent., enable him to receive for twenty years exactly what he would have received if he had been left in actual enjoyment, and, in the same way, 275*l.* invested at 4 per cent. and allowed to accumulate would bring to the reversioner 600*l.* at the end of twenty years. In this way each party is fully and fairly compensated. But it is common knowledge that a capital sum invested in the trade interest in a

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licence would be expected to yield a much larger rate of interest than 4 per cent. In this case the sum of 603*l.* represents the difference in value between the house licensed and unlicensed. It represents the difference in value to a brewer who had the freehold interest. But, since the decision in *Ashby's Cobham Brewery Co.'s Case* (1), I must assume that this valuation takes into account the estimated trade profit on the supply of the house. According to the evidence of Mr. Wilson, a witness for the lessees, one of the usual methods of arriving at the capital value of the licence on licensed premises where the profit on the barrelage is known, and where the tied rental is known, is to value the profit at ten years' purchase, and to add the difference between the capitalized value of the tied rental and the rental which would be received if the premises were unlicensed. In this case the tied rental was 19*l.* 10*s.*, and the rental of the premises unlicensed was practically agreed at about 20*l.* So that there was no loss to the brewer in the way of rent by the extinction of the licence. What the brewer in this case lost was the profit on the supply. This it is usual to capitalize at ten years' purchase. It would not, therefore, be unfair to assume that in this case the lessees have lost the enjoyment of 10 per cent. on a 603*l.* investment for twenty years. If now I were to accept the principle of apportionment stated by Mr. Scott, but to correct its application by the substitution of a 10 per cent. rate of interest, as being the rate earned in this case, instead of a 4 per cent., which is the rate earned in an ordinary freehold property, I should have to apportion the amount by giving something like 510*l.* to the lessees and 93*l.* to the lessors. But Mr. Wilson, one of the witnesses for the lessees, in his evidence stated that, if he had to apportion the amount of 603*l.*, he would do it on an 8 per cent. basis, and I think this is a reasonable way of looking at it. If I am entitled to look at the evidence of the actual profit which the lessees were making, there is evidence that it was over 60*l.*; but it might be reasonable to assume that over a long course of years it would not average more than 8 per cent. on the capital value of 600*l.* I am satisfied that, however the capitalization calculation

(1) [1906] 2 K. B. 754.

is made, whether it be on an imaginary or actual gross rack rental with a given number of years' purchase, or on an estimate based upon gross or net takings, or upon an estimate based upon the profits of the barrelage, the brewer will expect to get a return of from 8 per cent. to 10 per cent., and would not nominally pay a price which would not bring him in a return of from 8 per cent. to 10 per cent. Various calculations based upon hypothetical rack rentals were put in before me, but from their artificial character they tended rather to obscure than elucidate the question. An alternative calculation was put in by Mr. Hartley, on behalf of the lessors, based upon a hypothetical rack rental of 36*l.* and an apportionment on the 4 per cent. tables. The result shows how fallacious such calculations may be. Under it the lessees (who were in the enjoyment of over 60*l.* profit a year, due to the trade interest in the licence, and were entitled to possession for twenty years) would have received 291*l.* 16*s.*, and the lessors, who have a reversionary interest, hypothetical and contingent in its character, and dependent on the will of the lessees, would have received 311*l.* 0*s.* 8*d.* The result is a sufficiently destructive criticism of this method. If the difference in value as between the premises licensed and unlicensed payable to the corporation were calculated upon the usual scale applicable in the case of leasehold premises, and to which reference was made, it would seem, according to the calculation of Mr. Robert Wylie, to be about 94*l.* 7*s.* 7*d.* if the gross rack rental were taken at 30*l.* a year, and it would, I calculate, amount to about 126*l.* if the gross rack rental were taken at 36*l.*, which was the valuation of Mr. Hartley. This method of calculation fixes the amount payable to the reversioners as between the limits of 94*l.* and 126*l.* The basis of calculation upon the 10 per cent. or 8 per cent. tables, to which I have previously referred, fixes the amount payable to the reversioners as between the limits of 93*l.* and 128*l.* These two methods, therefore, perhaps accidentally, produce about the same result. On the whole, I think the suggestion of Mr. Wilson that the sum of 603*l.* should be apportioned on an 8 per cent. basis is the most businesslike and the fairest solution of the problem. It will, I think, give to the lessees less rather than more than is their due, and to the lessors more rather than

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less than is their due. But it was suggested as a basis by one of the witnesses of the lessees that there was an expense of 15*l.* for altering the premises, which should be distributed. Making the best apportionment I can, I have come to the conclusion that the 603*l.* should be divided as between the lessors and lessees as follows: 120*l.* to the corporation of Liverpool, the lessors; 483*l.* to Messrs. Peter Walker & Son, Limited, the lessees = 603*l.* But, as out of this 75*l.* has to be paid rateably to the tied tenant, my final apportionment is as follows: 75*l.* to the tied tenant; 105*l.* to the corporation of Liverpool; 423*l.* to Messrs. Peter Walker & Son, Limited."

The Divisional Court reversed the decision of the county court judge, holding that the 4 per cent. interest table was the proper one on which to compute the parties' respective shares in the compensation money. (1)

Cripps, K.C., and *F. E. Smith, K.C.*, for the lessees. The lessees do not contend in this Court that there was no right of appeal from the county court in a case of this kind.

There was, however, in this case no ground for appealing from the county court judge. His decision on a question of fact cannot be reviewed, and what he decided here was a pure question of fact. The Divisional Court have, in effect, held that, as a matter of law, the 4 per cent. interest table was applicable in this case for the purpose of calculating the proportions in which the compensation money should be divided. But the question what table was appropriate, having regard to the facts of the case, cannot be a question of law. The county court judge has not admitted any evidence of an inappropriate or inadmissible character. The decision in *Ashby's Cobham Brewery Co.'s Case* (2) shews that the matters which he took into consideration were all admissible for the purpose of arriving at the total sum payable for compensation for the extinction of the licence, and,

(1) There was a second appeal raising precisely similar points with regard to another licensed house. See [1908] 1 K. B. p. 30. The Divisional Court having reversed the decision of the county court judge in that case also, their decision was appealed against, and that appeal was admittedly governed by the judgment in the case reported.

(2) [1906] 2 K. B. 754.

that being so, they were equally admissible for the purpose of ascertaining the respective interests of the parties interested, and the proportions in which the total sum should be divided. It is altogether fallacious to treat this case on the same footing as one of apportionment between tenant for life and remainderman in the case of an ordinary freehold security, and to apply the 4 per cent. table as in the case of such a security. The rate of profit which a brewer investing in such premises would be likely to make, the character and age of the house, and any facts tending to shew that the security was a wasting or precarious security, as for instance the fact that the lessees were not bound to keep up the licence, in short, all the circumstances of the particular case, must be considered for the purpose of dividing the amount of the compensation, just as they must be considered in determining that amount.

Sir R. B. Finlay, K.C., and *Leslie Scott*, for the corporation. The county court judge proceeded on a wrong principle in point of law in apportioning the compensation money. The amount of trade profit which a brewer, on taking a lease of the premises, would expect to make on his capital may, no doubt, be an element for consideration in estimating the amount of rent he would give, and the value of the premises, for the purpose of assessing the total amount of compensation payable; but it does not follow that it ought to be taken into consideration in estimating the respective interests of the parties for the purpose of apportioning the compensation. The evidence in this case shewed that, in general, licensed premises were regarded as a perfectly sound and permanent security, and one, therefore, to which the 4 per cent. interest table was appropriate; and the county court judge does not really find that they are otherwise. If he had, possibly that might have been a finding of fact which could not have been challenged; but that does not seem to have been in truth the ground of his decision. He appears to have adopted the 8 per cent. table merely because the profits which the lessees must be taken to have lost by the extinction of the licence represented 8 per cent. upon the capital value of the licence as assessed by the Commissioners of Inland Revenue. But the amount of the trade profits which a brewer might expect to make on a purchase

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of a lease of licensed premises is not the proper measure of the value of his interest in them for the purpose of the apportionment; it is only material as supplying a motive for his competing for the premises in the market. If the consideration of the brewer's profits be excluded, there was no evidence to shew that the 8 per cent. table should be adopted. The question what table should be adopted depends entirely on the degree of soundness of the security. As has been stated, the only evidence of experts on the subject treated licences as perfectly sound securities. The Court will, as the Court of Chancery has been in the habit of doing, take judicial notice that 4 per cent. is the normal rate of interest on sound securities.

Cripps, K.C., for the lessees, was not called upon to reply.

LORD ALVERSTONE C.J. Speaking for myself, I regret that the contention that no appeal lies in such a case as this from the decision of the county court judge has not been raised before us, though I can understand that the appellants may have some reason under the circumstances for not raising it. This case, however, must not be cited, so far as I am concerned, as deciding that, in a case where, under s. 2, sub-s. 3, of the Licensing Act, 1904, the division of compensation money has been referred to a county court judge, there is any appeal from his decision. I wish briefly to notice the point, because, though it has not been argued, it may be desirable to draw attention to some of the matters material to be considered in relation to it. It does not appear to be disputed in the judgment of the Divisional Court that, if the quarter sessions had apportioned the compensation money, there would have been no appeal from their decision. Sub-s. 3 provides that, "if, on the division of the amount to be paid as compensation, any question arises which quarter sessions consider may be more conveniently determined by the county court, they may refer that question to the county court in accordance with rules of court to be made for the purpose." The rules made under the Act, so far as proceedings in county courts for the division of compensation money are concerned, are to be found apparently in the County Court Rules, 1905. The only rule which appears to be material is r. 29, which says that "subject

to the express provision of these rules, the procedure on a petition shall be the same as the procedure on any other petition to the Court." As the point has not been argued before us, I do not express any opinion on it further than to say that I think it very doubtful whether it was intended that there should be any appeal from the county court, where it is substituted for the quarter sessions under sub-s. 3. Having regard, however, to the view which we take of this case, the point does not become so important. If it had been, I should have desired that it might be argued.

The counsel for the corporation have admitted that, if this is to be regarded as an ordinary county court appeal, then the ordinary rules as to such appeals apply, and the finding of a county court judge on a mere question of fact cannot be reviewed in this Court. For that reason they have argued before us that here the county court judge has gone wrong, not merely on a question of fact, but on some principle of law. The question which we have to consider in this case is whether that is so. For that purpose we must see what it is that the county court judge has decided.

Under sub-s. 1 of s. 2 of the Licensing Act, 1904, the compensation payable for non-renewal of the licence is to be ascertained by finding out what sum would be "equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act, and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises." That sum in this case was found to be 603*l.*, from which is to be deducted for the present purpose 75*l.*, the sum agreed to be given to the holder of the licence. I pause here for a moment to say that it is not disputed that in ascertaining the amount of 603*l.* the Inland Revenue Commissioners must be taken to have proceeded on the basis of the judgment in *Ashby's Cobham Brewery Co.'s Case.* (1) It is no part of my duty in this case, nor have I the right,

(1) [1906] 2 K. B. 754.

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to criticize or deal with the judgment in that case; but, in so far as it is necessary to consider that judgment as bearing on s. 2 of the Act, I do not see how it can possibly be attacked. It appears to have proceeded on a basis which was practically admitted by the Law Officers of the Crown, and was not appealed against; and therefore, unless we could see that it was necessary for the purposes of this case to question it, it must be taken to be the law. It seems to me to proceed on the ordinary well-recognized principles of valuation: you consider the persons, and among them the brewers, who would be likely to be in the market as possible competitors for the acquisition of an interest, as tenants or owners, in the licensed premises. How and to what extent that would affect the valuation is a different matter, but the counsel for the corporation most properly admitted that they could not dispute that, upon the principle laid down in the judgment in *Ashby's Cobham Brewery Co.'s Case* (1), which they adopted as correct, in assessing the value under s. 2, sub-s. 1, of the Act, among the facts which would have to be taken into consideration by the assessing tribunal would be any facts going to shew that the brewers, as possible tenants, would be willing to give so much by way of rent for the licensed premises, as such. I incidentally desire to notice here that, in that calculation, if it be right to say that one of the tests is by taking the amount of the annual profits on the sale of beer upon the barrelage of the beer sold, and multiplying it by ten in order to get ten years' purchase, no one would suggest that this would be treating the matter on the basis of a 4 per cent. security. All that the counsel for the corporation really suggested was that, when the amount of the value under s. 2, sub-s. 1, had been ascertained by taking those profits into consideration, then, for the purposes of the apportionment, the licensed property at that rent was regarded by valuers as being a 4 per cent. security. Therefore we have it admitted as a datum that, in estimating the value to be put upon the licensed premises for the purpose of ascertaining the difference of value mentioned in s. 2, sub-s. 1, of the Act, the rent which the brewers would give is to be taken into consideration.

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What is the problem under s. 2, sub-s. 2? The sub-section provides that "the amount to be so paid shall, if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises, and is approved by quarter sessions, be that amount, and in default of such agreement and approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on a valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions." It has been said for some reason which I am wholly unable to follow that, although it is to be assumed for this purpose that certain matters may be taken into consideration for the purpose of arriving at the total amount which has to be divided, yet, in determining the proportion of that amount which is to be awarded to each of the persons interested, and particularly the brewer or other person who is lessee of the premises, you must not have regard to those same matters. It seems to me that the considerations which are admissible for the purpose of determining the total amount of compensation to be paid, as bearing upon the nature and value of the premises, and upon the question of the rent which possible tenants would pay, would likewise be admissible when you are dealing with the question how that amount is to be divided among the different persons interested. I only lay that down as a general proposition. I do not think it is essential for the decision of the case before us; but I am unable to see, if it were necessary to decide the point, why, if a matter throws light on the total amount to be divided, it may not also throw light on the proper mode of dividing that total amount.

Now what has the county court judge done in this case? He says in his judgment: "In this case I have to apportion the sum of 603*l.* found by the Inland Revenue Commissioners to be the amount payable in respect of the extinction of the licence of No. 8, Bridgwater Street." And then, after stating who were the parties interested, he says: "Mr. Leslie Scott, who appeared for the lessors, contended that I was bound as a matter of law to divide

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the sum of 603*l.* between the lessors and the lessees in a proportion determined by an actuarial calculation based upon the 4 per cent. interest tables." That statement, as I understand, must be qualified to this extent. Mr. Leslie Scott has stated before us—and I have no doubt accurately—that he did not contend that, as a matter of law in all cases, but that, as a matter of law on the evidence before the county court judge in this case, the proportions must be so calculated. I will assume that this was so, though I do not know that it makes any real difference. Now, is it right to assume, either as a matter of law generally, or as a matter of law upon the evidence before the county court judge, that the 4 per cent. table must be adopted in calculating the proportions of the total amount of compensation which are to be awarded to the parties interested respectively? It seems to me, when I read the rest of his judgment, perfectly clear that there was evidence before the county court judge which left it open to him to say whether he would adopt the 4 per cent. table or not. After proceeding to deal with the figures put forward by Mr. Leslie Scott, he says: "Mr. Scott based this contention upon the analogy of an apportionment between a tenant for life and remainderman in the case of an ordinary freehold estate." That shews that the contention was that, either as a matter of law generally, or upon the evidence, the 4 per cent. table was the only one which could be adopted. Then he proceeds: "Mr. F. E. Smith, for the lessees, contended that this method was inapplicable to the division of a capital sum paid in respect of the extinction of a licence, and that I was entitled to take into account the nature of the interest, the vicissitudes to which it was subject, the age and character of the house, and the fact that the lessees were under no obligation under their lease to maintain the licence, or to surrender the premises with a licence." I have not heard a single word in argument from the counsel for the corporation which in my opinion tends to shew that all these matters are not proper matters for consideration, and I venture to think that, to any one with any knowledge of the subject of valuation, they must clearly appear to be proper matters for consideration, in determining the question which the county court judge had

before him. If, in the case of two licensed houses, the position of one is more favourable for custom than that of the other, or one is better appointed than the other, or, in the case of one of them, there is an obligation on the lessee to maintain the licence, and, in the case of the other, there is no such obligation, why, as a matter of law, is the 4 per cent. table necessarily to be applied in the case of both of them alike? I am wholly unable to follow the argument. If it had been contended that such things were never to be taken into consideration, I could understand it better, but that does not appear to be contended. Then the county court judge proceeds to say that he does not know upon what evidence the Inland Revenue Commissioners acted in arriving at the sum of 603*l.*, but he assumes that it was upon the same basis as is laid down in *Ashby's Cobham Brewery Co.'s Case.* (1) He then goes on to refer to the ordinary case of a freehold estate, and says: "But it is common knowledge that a capital sum invested in the trade interest in a licence would be expected to yield a much larger rate of interest than 4 per cent." In saying that he may have proceeded on the admissions of counsel, or on the statements made before him in evidence. All I can say is that, in the face of what admittedly is the common and usual mode of estimating the rent which would be given by brewers for the premises, it seems to me clear that the learned county court judge was there expressing the conclusion at which he arrived as a matter of fact, and it cannot be said that he was dealing with any question of law. Then he deals with *Ashby's Cobham Brewery Co.'s Case* (1), and the method of arriving at the barrelage, and proceeds: "If now I were to accept the principle of apportionment stated by Mr. Scott, but to correct its application by the substitution of a 10 per cent. rate of interest, as being the rate earned in this case, instead of a 4 per cent., which is the rate earned in an ordinary freehold property, I should have to apportion the amount by giving something like 510*l.* to the lessees and 93*l.* to the lessors. But Mr. Wilson, one of the witnesses for the lessees, in his evidence stated that, if he had to apportion the amount of 603*l.*, he would do it on an 8 per

(1) [1906] 2 K. B. 754.

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cent. basis, and I think this is a reasonable way of looking at it." Nobody now suggests that Mr. Wilson did not say that, although, possibly, his valuation may have proceeded on a somewhat different view of the law; and, that being so, there was this evidence before the county court judge. Under those circumstances, and wishing to give full consideration to the arguments of the counsel for the corporation, so far as I have been able to follow them, I have been from beginning to end unable to see that there is any question of law involved in this case at all. It seems to me to have been a decision—be it right or wrong, as to which I say nothing, and have no right to say anything—upon a question of fact.

Now let me for a moment or two consider the reasons given by the Divisional Court. My brother Phillimore, with great respect to him, appears to treat the question as one of fact, to which, however, certain rules of law must be applied. He says (1): "The sum then being immediately divisible must be, in my opinion, divided in such proportions as will give the leaseholder the present value of an annuity for the number of years that the lease has to run, and give the reversioners the present value of the deferred capital, the interest on which will produce the annuity. Those are the figures which there would be no difficulty in arriving at when once you have got the necessary factor of the rate of interest on which the present values are to be calculated." It is of course clear that, according as you take the higher or the lower rate of interest, you will get a larger amount for the leaseholders and a smaller amount for the reversioners, and vice versa. The learned judge then proceeds: "What, then, is that rate of interest? The answer is that it must be taken to be that which is the usual rate in this country for money forborne"—which I understand to mean lent—"when the security is ample, and no part of the interest is required for insurance against risk, and that rate must be taken as not exceeding 4 per cent." With great deference to the learned judge, I know of no such rule of law, but, under any circumstances, the proposition proceeds on the assumption that the security is ample, and no part of the interest is required for insurance

(1) [1908] 1 K. B. 28, at p. 37.

against risks. It includes considerations with regard to the interest ordinarily expected by persons who put their money in investments of that kind, and overlooks entirely those considerations which are mentioned in the judgment of the county court judge, and which have not been attacked as inadmissible, e.g., the age and character of the house, and the other matters to which I have already alluded and will not repeat. I know no such rule of law as my brother Phillimore lays down. Sir R. Finlay in his argument for the corporation appeared to suggest some kind of distinction between the trade interest of the brewers as lessees of the premises and that of the reversioners as owners of property. I think that is fallacious. Both parties must be regarded as having the same kind of interest in the premises as licensed premises. The compensation is awarded for the difference between the value of the premises as licensed premises and that which they will have as unlicensed premises, and the corporation are not entitled to say that, for the purposes of the division, their interest must be regarded as a much better secured interest than the lessees' trade interest. Both must be regarded as having the same kind of interest, and then the question is what is the rate of interest that people would expect to get in the case of a security of that kind. That comes back again, as I have said, to a question of fact. The judgment of Walton J. concludes thus: "Where the judge, in my opinion, went wrong was in thinking that, because for the purpose of arriving at the aggregate sum the lessees' profits, as brewers, were rightly taken into consideration, they ought also to be taken into account for the purpose of deciding the proportions in which that sum was to be divided between the lessors and lessees." I am, as I have already said, unable to agree in that view. It seems to me that, when you are considering the nature of the interest of persons, it may be for a term of years or for any other time, in licensed premises, as distinguished from the premises as unlicensed, you have to consider what is the value of those premises. How is it to be arrived at? What number of years' purchase or standard of valuation is to be adopted? I fail to see why the same considerations should not be taken into account for this purpose by the

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tribunal which has to divide the aggregate amount of compensation as may be taken into account by the tribunal which has to determine that amount. Therefore, with great deference to my brother Walton, in my opinion the fallacy which he suggests in the reasoning of the county court judge did not exist.

I am, therefore, of opinion that this decision of the county court judge was one of fact, and of fact alone. There was evidence upon which he was entitled to come to the conclusion at which he arrived. Whether I should have arrived at the same conclusion is immaterial. I have not considered the matter, but I am clearly of opinion that, if the ordinary county court practice applies, the question was one of fact, and the county court judge has not been shewn to have gone wrong on any question of law. Therefore I think that the appeal must be allowed.

FARWELL L.J. I agree. If it were necessary to decide the question whether any appeal lies in such a case as this from the county court judge, I should desire to consider the matter further; and it must not be taken that this Court approves the decision of the Divisional Court that such an appeal will lie. It is not immaterial to observe that, in sub-s. 2, where it was intended that an appeal should be given, namely, against the decision of the Inland Revenue Commissioners, it is given in express terms.

However that may be, in my opinion the decision of the Divisional Court was wrong, because they have allowed an appeal upon a pure question of fact.

The Act has given a sum of money as "compensation" for the extinction of the licence, which is to be divided amongst the persons interested in the licensed premises. "Compensation" implies that the party compensated is to receive payment in lieu of an interest which he had in the licensed premises. That is made clear by the proviso to sub-s. 2, which provides that in the case of the licence-holder—who in the present case has been settled with, and therefore need not be considered—regard is to be had not only to his legal interest in the premises, or trade fixtures, but also to his conduct and to the length of time during

which he has been the holder of the licence. That provision, read in connection with the last two lines of sub-s. 1, shews that "persons interested" means the persons who have a legal interest in the premises, and that it is that interest in respect of which compensation is to be given. The value of a man's legal interest, for which he has to be compensated, must be that which it would fetch in the market. I should have thought myself that the proper way of ascertaining that would have been to value the respective interests of lessee and reversioner in the premises, and to divide the compensation money between them in proportion to the value of their interests in the house, e.g., if the lessee's interest in the house would fetch 6000*l.* and the reversioner's 4000*l.*, and the compensation was 500*l.*, the lessee would get 300*l.* and the reversioner 200*l.* The lessee's interest would be valued on the basis that the house was a licensed house, taking into consideration all the usual matters, not omitting the consideration of profits, referred to in *Ashby's Cobham Brewery Co.'s Case.* (1) This does not, of course, mean that the whole of the profits made by the man are to be treated as emanating from the house itself. The chance of making those profits, to a brewer, who is to be regarded as a possible bidder for the house by reason thereof, obviously adds largely to the value of the house. That is a matter which has, admittedly, to be taken into consideration in ascertaining the total sum to be divided, and on the basis that I have suggested cannot be excluded in the division of the compensation. When the values of the respective interests have to be considered, the matters specified in the judgment of the county court judge, to which the Lord Chief Justice has called attention, such as the nature of the interest in licensed premises, the vicissitudes to which it is subject, the age and character of the house, the fact that in the particular case the lessees were under no obligation to maintain the licence, or to surrender the premises with a licence, and such like, are all matters which must be taken into consideration. No purchaser of the term or of the reversion could possibly disregard them. Expert evidence would have, of course, to be called on these points. With all respect to them, the fallacy into which

(1) [1906] 2 K. B. 754.

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the Court below has fallen is in treating this question of value as a question of law, and not a question of fact. The question of value depends upon the evidence, and it is none the less a question of fact because the evidence consists only of the opinion of experts. When an expert is called and says that the lessee's interest is worth so much, and the reversioner's so much, he may of course be cross-examined as to the mode in which he arrives at his figures, and whether he has worked them out on a 4 per cent. or a 5 per cent. table, and so on, but the question remains one of fact. If he has used a 5 per cent. table when he ought to have used a 4 per cent. table, that is only the basis on which he founds his opinion with regard to a question which is one of fact, and the judge of fact will accept or disregard his evidence according to the usual rules of evidence. I can see no ground for saying that in all such cases a 4 per cent. basis must be assumed to be applicable. It does not appear to me that the learned judges in the Court below have made any distinction between a seven years lease and a twenty-one years lease, or the remainder of a long term, with very light covenants, and a twenty-one years lease with onerous covenants. Each case must depend on its own circumstances. Mr. Leslie Scott appealed to the practice of the Chancery Division, and to the rules applied there for the purpose of dividing reversionary interests, which ought to have been sold and have not been sold, between tenant for life and remainderman, or with regard to the amount charged in respect of trust funds which have not been properly invested. There is, no doubt, a recognized rate of interest in the Chancery Division, in some cases fixed by statute, as on legacies, at 4 per cent., and in other cases fixed, by what has been the experience of years, at a rate which, until recently, used to be 4 per cent. But some of the judges have in some instances taken judicial notice of the fact that, of late years, it has not been easy to get 4 per cent. in trust securities, and have said that it was reasonable to take 3 per cent. This is no rule of law. It is a question of fact proved by experience to such an extent that the Courts would take judicial notice of it. The fact that the property in question in such cases belongs to one class, namely, that of trustee

investments, renders it possible to ascertain by evidence the average rate of interest on such investments, and after a sufficient lapse of time to take judicial cognizance of such average rate; but this has no application to the price of licensed premises varying according to tenure, length of term, covenants, and an endless variety of other considerations. The result is that the whole matter is one purely of fact, and was so dealt with by the county court judge; and there is no appeal from his decision upon the matter.

KENNEDY L.J. With regard to the first point to which my Lord and Farwell L.J. have alluded, I also have great doubt as to whether an appeal lies at all in such a case as this; and that doubt is strengthened by the fact that, apparently, under the Licensing Act, 1904, s. 2, sub-s. 3, which, so far as I know, is the only provision which authorizes the county court judge to deal with the matter, the reference is one which may be limited by the quarter sessions to any particular questions which they may desire to refer. Not only does that appear to be expressly stated in the sub-section, but, by the County Court Rules, 1905, r. 15, "the reference shall be in the form of an order of the compensation authority, which shall state concisely the question referred, and the circumstances in which the question arises and any facts found by that authority in relation thereto"; and by r. 16, "in any case in which it seems necessary or expedient, the judge may, at any time, send the order of reference back to the compensation authority for further information touching the facts or circumstances in which the question arises or for further explanation of the nature of the question intended to be referred." Under these circumstances, I feel a difficulty in seeing how it can have been intended that the decision of the county court judge on a given question referred to him by the compensation authority should be the subject of an ordinary county court appeal to the High Court. The provision apparently is that the quarter sessions may consult the county court judge upon certain questions, which he may determine for them, upon certain information which they give him. It is very much like the statement of a special case with a request to a proper legal authority,

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who may be presumed to decide rightly any point of law, for advice as to what ought to be the legal result upon certain given facts. If that be so, it is really a determination of points of law, or a point of law, if a single question only is submitted, for the information of the authority which consults the county court judge. I am not deciding the question, for it is not raised before us here; but I have the greatest doubt whether the machinery does not on the face of it shew that there was no intention that, where the quarter sessions, who may divide the compensation themselves, and from whose decision on the case there would be no appeal, refer a question to the county court judge, there should be an appeal from his decision to the Divisional Court. The question appears to me so doubtful that at present the balance in my mind is against the existence of any right in such a case to appeal.

Assuming, however, that there is a right of appeal, still I think, with great respect to the Divisional Court, that their decision was wrong. I need only add a very few sentences to what has been already said. Essentially the question was one of fact; and I think myself that it is fallacious to suppose that certain tables, such as a 3 per cent., or a 4 per cent., or a 5 per cent. table, are to be regarded as applicable in point of law for the purpose of solving a question of this kind, whereas the use of such tables only means that they have been found to supply in such cases a method, which the experience of the financial world finds to be justified, of determining what in fact a person would be likely to give for the property or to accept as its value. Here the problem is to divide a certain sum, which has been fixed as the total compensation to be given, between the parties interested in the licensed premises in proportion to their respective interests. Several persons may be so interested, as in the present case. The value of the interest of each person who claims to be interested must be estimated, and, to get at that estimate, it has to be considered what a person who was asked to purchase that interest would give for it in the market. I do not follow the view of the learned judges in the Court below when they suggest that the matter must necessarily be dealt with on the footing of a security to

which the 4 per cent. table applies. Take the case of the lessees' interest. They have an interest in the licensed premises which will last for so many years. The question is what that interest will fetch in the market. It may be that it has been ascertained by experience that a person bidding for property of that kind will be willing to give a sum which, when worked out, would give so much interest on so much capital in so many years. But all that is only a mode of arriving at a conclusion in reference to a question of fact, namely, what the interest would fetch in the market. The same considerations apply to the interest of the reversioners. With regard to the licence-holder, who is the actual occupant, the Act shews that it was intended to act on an equitable basis rather than on the basis of strict law as to his valuation, because his conduct and other matters are to be considered in arriving at the proportion which he is to receive. It seems to me that the learned county court judge has dealt correctly with the question. Taking into consideration the various views put before him, as supported by the evidence of the experts called on one side and the other, he set himself to determine first of all the relative values of the interests to be assessed, and then, having a fund which must be taken to represent the total of such interests, to divide that fund accordingly. I think that what he had to deal with was a pure question of fact. It does not seem to me that it is right to say that he should have dealt with the case on the footing that any particular table such as the 4 per cent. table was necessarily applicable.

Appeal allowed.

Solicitors for corporation: *F. Venn & Co., for Pickmere, Town Clerk, Liverpool.*

Solicitors for lessees: *J. Hands, for E. Berry & Co., Liverpool.*

E. L.

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1908

Feb. 27;
March 16, 20, 26

[IN THE COURT OF APPEAL.]

TRUSTEE OF THE PROPERTY OF F. LORD (A BANKRUPT) *v.* GREAT EASTERN RAILWAY COMPANY.

Bill of Sale—Licence to take Possession—Carrier's Lien—Agreement giving Credit to Trader for Carriage of Goods subject to Preservation of Lien—Possession—Goods on Land in Tenancy of Owner—Seizure of Goods under Credit Agreement—Trespass—Bankruptcy—Mutual Dealings—Set-off—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

A railway company by a tenancy agreement terminable at a month's notice by either party let to a coal merchant certain land at a yearly rental for the purpose only of stacking coal unloaded from trucks on the company's railway sidings. The demised land adjoined the sidings and was within the company's railway yard, the gates of which were closed during the night. By an agreement, called a ledger agreement, between the company and the coal merchant, the company agreed to open in their ledger a monthly credit account with the coal merchant for the carriage of coal upon condition that they should have a continual lien upon all waggons and goods conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggons and goods to satisfy the lien; and the company reserved the right to close the account upon giving one day's notice of their intention so to do. The account being in arrear, the company gave notice and closed the account and took possession of the coal in the trucks in the sidings and the coal on the demised land. The coal merchant was shortly afterwards adjudicated bankrupt. His trustee in bankruptcy brought an action against the company for trespass and for the value of the coal, which had been sold after the bankruptcy by consent of the parties, alleging that the ledger agreement was a bill of sale and void for non-registration. The company denied liability and claimed under s. 38 of the Bankruptcy Act, 1883, to set off a sum admittedly due to them by the bankrupt for the carriage of coal against any sum they might be held liable to pay in the action. Phillimore J. held, (1.) that the ledger agreement was not a bill of sale and that the action failed; (2.) that, assuming the trustee could have recovered, the company would have had no right of set-off. The trustee appealed so far as the decision related to the coal on the demised land, and the company lodged a cross-notice of appeal as to set-off:—

Held (1.) by Cozens-Hardy M.R. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the coal on the demised land was at the date of seizure in the possession of the bankrupt, and that the company's common law lien for carriage had ceased, and consequently that the

ledger agreement qua that coal was a bill of sale, being either a licence to take possession or an agreement conferring a right in equity to the coal or a charge or security thereon; (2.) that at the date of the receiving order the right of the bankrupt was a right to a return of the coal and the right of the company was a right to money, and that these two claims could not be set off under s. 38 of the Bankruptcy Act, 1883.

APPLICATION by the plaintiff for judgment or a new trial on appeal from verdict and judgment at the trial of the action before Phillimore J. and a special jury. (1)

For some years prior to his bankruptcy F. Lord carried on business at Norwich as a coal merchant. By four written agreements between the years 1902 and 1904 the defendant company let to Lord certain plots of land called "allotments" at their Norwich Victoria Station at certain yearly rentals. These agreements were terminable at one month's notice by either party. By these agreements the tenant stipulated (amongst other things) that he would occupy the premises for the purpose only of stacking and dealing with coal and coke passing over the company's railway, and that he would not assign or underlet without the consent of the company; and in the event of the rent falling into arrear for seven days, or of the tenant failing to observe the conditions therein contained or becoming bankrupt, the company were empowered to re-enter and take possession of the demised premises. And as part of the consideration upon which the company agreed to let the premises to the tenant, the tenant further agreed to pay to the company in respect of all traffic passing over the company's railway and to or from the said premises the same rates and charges as were usually paid on traffic of a similar kind if such traffic had been accommodated and dealt with by the company at their Norwich Victoria Station. These allotments adjoined the railway sidings of the company and were within the company's yard, the gates of which were kept closed during certain hours of the night. They were used by Lord as a depot for stacking coal unloaded from trucks standing in the sidings. By virtue of an agreement dated February 19, 1903 (hereinafter referred to as the ledger agreement), the company, at Lord's request, opened in his name a

(1) [1908] 1 K. B. 195.

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monthly credit account for the carriage of coal upon the following (amongst other) conditions, namely: "(3.) The company to have a continual lien upon all waggons, goods, minerals, articles, and things hauled or conveyed on their lines, or which shall be at any time upon the railway or upon any ground allotted by or rented of the company, for all tolls, rates, charges, and moneys which shall be or become due or payable to the company, as well as in respect of the particular waggons, goods, minerals, articles or things which from time to time may be so carried as in respect of all waggons, goods, minerals, articles, and things which shall at any time have been hauled or conveyed along or be upon the railway, or any part thereof, and the company to be at liberty from time to time and in such manner as they shall think fit to sell and dispose of all or any of such waggons, goods, minerals, articles, and things in order to satisfy such lien. (4.) The company reserve to themselves the right to close the account at any time upon giving one day's notice in writing of their intention to do so, whereupon the whole of such account shall become immediately payable. (5.) The company's coal ledger accounts are made up monthly to the last day of each month, they are sent from the London office by the 15th of the following month, and must be paid in full before the 26th of that month." In September, 1906, Lord's account under this agreement was considerably in arrear, and on October 15 the company closed the account.

On the same day the company, purporting to act under the ledger agreement, locked the gates leading to the allotments and took possession of (*a*) 378 tons of coal on the allotments as well as certain business plant belonging to Lord, and (*b*) 270 tons in trucks which were on the railway sidings.

On October 18 Lord called a meeting of his creditors, with the result that he filed his own petition and was adjudicated bankrupt on November 15, and the plaintiff became trustee of his estate. On January 7, 1907, the company abandoned their claim to the plant, which was sold by the plaintiff for the benefit of the bankrupt's estate, but they still claimed the coal, and on January 12 this action was commenced.

The plaintiff by his statement of claim alleged that the

defendants wrongfully and in breach of the tenancy agreements prevented the bankrupt from having access to the allotments by wrongfully locking the gate giving access thereto, and trespassed upon and took possession of the allotments, and also wrongfully seized and took possession of the goods and chattels in the bankrupt's possession above specified and removed the same and converted them to their own use and completely stopped the further carrying on of the bankrupt's business; that the ledger agreement operated as a bill of sale and was void for non-registration under the Bills of Sale Acts, 1878 and 1882; and that by reason of the premises the bankrupt's credit was ruined and the goodwill of his business destroyed, and he was compelled to suspend payment.

The plaintiff claimed—(1.) damages for the trespass to the bankrupt's lands; (2.) 500*l.* the value of the coal and damages for the said removal and conversion; (3.) a declaration that the goods in question formed part of the property of the bankrupt and passed to the plaintiff as his trustee free from any claim of lien or other security of the defendants.

By their defence the company justified their acts under the ledger agreement and denied that Lord's bankruptcy was caused by their closing of his ledger account. They also alleged (as the fact was) that Lord owed them before his bankruptcy 1138*l.* for carriage of coal, and they claimed to set off that sum against the sum (if any) that the plaintiff might recover against them.

The coal was sold by agreement between the parties, and the proceeds amounted to approximately 467*l.*, which was paid into a bank in the joint names of the plaintiff and the defendants.

At the trial of the action it was agreed that, assuming the defendants' acts were not justified in law, 520*l.* was the value of the coal and 25*l.* the damages for the detention of the plant. On the same assumption the following issues were left by the judge to the jury: (1.) Did the acts of the defendants bring about the bankruptcy of Lord? If so, what damages? (2.) If it did not bring about the bankruptcy, what damages then? The jury gave a verdict of 150*l.* on the first point, but gave no verdict on the

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second point, as they thought it did not arise; but the parties agreed that the answer to the second question should be 50*l.* The learned judge then held—(1.) that the agreement was not a bill of sale and consequently that the whole ground of the action failed; (2.) that, assuming the acts of the defendants were not justified in law, the claims for the 150*l.* and the 50*l.* were in respect of a cause of action which was personal to the bankrupt and did not pass to his trustee in bankruptcy; (3.) that, assuming the plaintiff could have recovered damages, the defendants had no right of set-off inasmuch as this was not a case of mutual dealings within s. 38 of the Bankruptcy Act, 1883; and he gave judgment for the defendants with costs.

The plaintiff by his notice of appeal asked that this judgment might be set aside and judgment entered for the plaintiff for—(1.) a declaration that on October 15, 1906, the coal upon the allotments passed to the trustee in bankruptcy free from any claim for lien of the defendants; (2.) the value of the coal upon the allotments at that date; (3.) the 50*l.* agreed by the parties as the answer to the second question put by the judge to the jury; (4.) the 25*l.* agreed damages for the temporary detention of the plant. The plaintiff made no claim before the Court of Appeal in respect of the coal which was in the trucks on the railway sidings, nor on the ground that the acts of the defendants had brought about Lord's bankruptcy. The defendants gave notice of their intention to insist upon their claim to a set-off in the event of their being adjudged liable to the plaintiff.

The question whether the ledger agreement was a bill of sale was first argued.

Herbert Reed, K.C., and *Frank Mellor*, for the plaintiff. The ledger agreement is a bill of sale within the Bills of Sale Act, 1878, s. 4. It is either a licence to take possession of personal chattels as security for a debt or it is an agreement conferring a right in equity to personal chattels or to a charge or security thereon. The company had no right whatever to enter upon the allotments as landlords, or except under the ledger agreement. The goods to which this appeal relates were at the

time of the seizure in the possession of the bankrupt, and not of the company, and therefore the company had no carrier's lien thereon: *Stevens* v. *Marston* (1); *Coburn* v. *Collins*. (2) *Spencer* v. *Midland Ry. Co.* (3) is distinguishable, because there the owner of the goods was not a tenant but a mere licensee of the land for the purpose of storing the goods, and therefore the Court held that the goods were still in the possession of the railway company.

Scrutton, *K.C.*, and *Coller*, for the defendants. The demised land is in the middle of the station yard, and cannot be approached except by the defendants' land, and the demise was for a limited purpose only and with a limited right of entry, inasmuch as the gate to the station yard was always kept locked during the night. The tenancy agreement and the ledger agreement together amount to an agreement by which the possession which the defendants have by their lien continues so long as the goods are on the defendants' premises, including the demised portion. Possession was not taken by operation of these documents; it ensued by operation of law from the fact of the carriage of the goods, and the land on which the goods were stacked belonged throughout to the defendants. Taking the two documents together, they amount to very little more than a licence to use the land for the stacking of the coal, with an express proviso that the defendants' lien shall be retained. The defendants never parted with their right to keep the goods in their possession by closing the gate of the station yard. The principle of *Spencer* v. *Midland Ry. Co.* (3) therefore applies to the goods in the allotments as well as to the goods in the trucks on the sidings, and this ledger agreement is not as to any of the goods a bill of sale within the Act. It is not a licence to take possession of the goods, because the defendants never parted with possession. Nor is it an agreement conferring a right in equity to the goods, because the object of the agreement was to ensure that the possession of the defendants should continue for the purpose of their lien, which is a common law right: *Morris* v. *Delobbel-Flipo*. (4) Moreover, the Bills of Sale Acts were not aimed at

(1) (1890) 60 L. J. (Q.B.) 192.
(2) (1887) 35 Ch. D. 373.
(3) (1895) 11 Times L. R. 408, 542.
(4) [1892] 2 Ch. 352.

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transactions of this kind: *Charlesworth* v. *Mills* (1); *Ex parte Hubbard.* (2)

H. Reed, K.C., replied.

Cur. adv. vult.

March 16. COZENS-HARDY M.R. The only question argued before us on this appeal was this, whether a ledger agreement, to the precise terms of which I must hereafter refer, is a bill of sale within the definition in the Bills of Sale Act. But in the first instance it is convenient to consider some general propositions. A common law lien upon goods depends upon possession of the goods, and ceases when possession is parted with: Pollock and Wright on Possession, p. 213; *Forth* v. *Simpson.* (3) If a person having a lien delivers the goods to the owner of the goods, the lien is gone. And this is a fortiori when the goods are delivered to the owner on land of which the owner is in actual occupation. A lien of this nature is a common law right and not an equitable right. If, however, a right is claimed apart from possession by virtue of a contract with the owner of the goods, that is not a common law right, but is a right in equity only: *Morris* v. *Delobbel-Flipo.* (4) Whether a man is in possession or not is partly a question of physical fact and partly a question of legal inference. There may be no apparent difference between the position of a tenant under a demise of a field and the position of a licensee of the same field. But in the former case the possession is in the tenant, while in the latter case the possession remains in the owner. The question of possession is, in short, the vital and essential element in lien. A document which only confers upon the holder of a common law lien certain rights of disposition of or certain charges upon the chattels in his possession is not a bill of sale within the Bills of Sale Act. But a document which confers such rights upon a person who has no common law lien and no possession is a bill of sale within the Act. The material part of the definition is "a licence to take possession of personal chattels or an agreement by which a right in equity to personal chattels or a charge or security thereon is conferred." It remains to apply these principles to the facts of

(1) [1892] A. C. 231.
(2) (1886) 17 Q. B. D. 690.
(3) (1849) 13 Q. B. 680.
(4) [1892] 2 Ch. 352.

the present case. Lord was a coal merchant at Norwich. He had large dealings with the Great Eastern Railway Company, and in February, 1903, what is called a ledger agreement was entered into by which the company abandoned their special lien as carriers and opened a monthly credit account with Lord. [The Master of the Rolls read clause 3 of the agreement.] Subsequently the company granted to Lord several demises of allotments or bunkers in their coal yard. It is clear, and it was indeed admitted by Mr. Coller in his able argument, that these demises gave the exclusive possession of the allotments to Lord and were not mere licences to use the allotments. The company delivered to Lord coal purchased by Lord and conveyed in the company's trucks on to his allotments, i.e., his goods on his land. I agree that the demises must be taken with and subject to the ledger agreement of February, 1903, and, apart from the Bills of Sale Act, no difficulty would arise in giving effect to every word of the agreement. But, although full effect may still be given to it to the extent of all coal in the company's trucks or elsewhere in the possession of the company, the statute does not allow effect to be given to it in reference to coals on the demised allotments. A great point was made by reason of the peculiar position of the allotments in the middle of the company's yard, from which coal could not be taken without crossing the company's land, and it was argued that the contractual lien was only suspended and would arise as soon as the coal was moved. But I am unable to follow this argument. Phillimore J. seems to have thought the decision of this Court in *Spencer* v. *Midland Ry. Co.* (1) supported the contention of the railway company. But, with great respect to the learned judge, it seems to me to assist the plaintiff. Everything turned there upon this fact, that Spencer was only a licensee, and that the company retained possession of the land on which granite was stored. In my opinion the appeal must be allowed as to the only point argued before us, namely, as to the coals on the allotments.

FLETCHER MOULTON L.J. I regret that in this case I have not been able to come to a conclusion in harmony with that arrived

(1) 11 Times L. R. 408, 542.

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Fletcher Moulton L.J.

at by my brethren. It raises a very important question with regard to the rights of railway companies under certain arrangements commonly made with large customers in various branches of business. The pleadings in the action raised several questions, and more than one point is dealt with in the judgment of the learned judge in the Court below. But the point now in issue before us is by admission narrowed to a very simple one. It is whether, under the circumstances which I shall presently specify, the defendants, the Great Eastern Railway Company, had or had not a lien in respect of their unpaid account for freight charges upon coal belonging to Frederick Lord (of whom the plaintiff is the trustee in bankruptcy) which was at the material date stored in certain coal bunkers within the station yard of the defendants at Norwich. It is admitted that no question of bankruptcy law arises here, such as reputed ownership, &c., or any question as to or arising out of the right or claim of the defendants to sell the goods in order to pay the balance of their overdue account. It is simply a question of lien or no lien, and the relief asked by the appellant, the plaintiff in the Court below, is a declaration that no lien existed. That there was a contract between the parties purporting to give such a lien is not denied, but it is contended that such contract is void as being an unregistered bill of sale.

It is not disputed that a railway company has a lien on the goods carried by it for freight charges and thus has a right to detain the goods until those charges are paid. This important right is constantly enforced by railway companies in the conduct of their business; but in the case of large customers the insistence upon it in respect of each separate consignment of goods would give rise to delay and friction to a quite unnecessary extent, and it is therefore customary for the railway companies to have running accounts with such customers on the terms that they shall have a lien on all goods for the time being in their hands for any outstanding balances of this running account. The exact language used in these agreements may vary somewhat in different cases, but, generally speaking, the substance and effect is that which I have described.

It is not suggested by the appellant that there is any legal or other objection to this practice, or that the agreements embodying

it are in any respect invalid. A railway company is entitled to decide for itself the terms on which it will waive its strict legal rights over the particular goods that it consents to deliver before the freight charges upon them have actually been paid; and, so far from the terms in question being unreasonable, it is obvious that they are greatly to the convenience of the shippers. As the practice is thus to the advantage of all parties as well as to the public convenience in lessening the danger of sidings and stations becoming blocked, it is now adopted very largely.

In the case of bulky merchandise, and more especially coal, a further development has taken place. In order to avoid unnecessary detention of the trucks the coal is unloaded and stacked in the station yard. Some such arrangement is almost essential to the carrying on of the coal trade in large towns, because it must frequently happen that the demand for coals is at its highest when the difficulties of transport are greatest. To oblige their customers in this respect railway companies frequently acquire large station yards in which their big coal customers are permitted to stack their coal, they in return paying for the privilege in some manner agreed upon between the parties. For business reasons it is obviously essential that the same customer should always stack his coal in the same place or places in order to avoid confusion, so that special spots are allotted to the individual customers where they regularly stack their coal, and the payment for the privilege sometimes takes the form of payment for a licence so to use those particular spots, and sometimes, as in the present case, the form of rent under a demise of such spots for a like purpose. But by agreement between the parties the coal so stacked always remains subject to the lien for the outstanding balances of account as above described. It is out of an arrangement of this type that the present litigation arises.

A lien under English law is a very peculiar right, but its precise nature has been conclusively settled by a long line of decisions. In contrast to the operations of pledging or pawning the creation of the lien does not, strictly speaking, give to the holder any property in the goods subject to it: per Lord Esher in *Yungmann* v. *Briesemann*. (1) It is merely a right to retain

(1) (1892) 67 L. T. 642.

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the goods until the amount of the lien has been paid. During the period that the goods are so retained the true owner may be in very complete possession of the goods and have and exercise over them most of the ordinary powers of an owner; and indeed in my opinion it is correct to say that there is nothing in English law which prevents his possessing and exercising any and every right of an owner in possession which is not inconsistent with the maintenance by the holder of the lien of his right to retain. Take for example the best-known and most familiar instance of a lien, namely, the lien of an innkeeper over the goods of a traveller at his inn for the amount of his charges. The traveller is in actual possession of all his goods. He wears the clothes; he reads the books. He can put them in his own box and lock them up, and during the traveller's stay in the inn the innkeeper has no right to get at them nor to take them into his own personal possession so as to deprive the owner of their use. The owner is even entitled to certain legal rights and remedies in respect of those goods which depend on possession. For example, if a man in the next room were to detain those goods, the traveller could bring detinue for them. Nothing that is done with the goods short of removing them from the hotel affects the existence of the lien. The owner may lock them up in cupboards in his rooms, of which he alone has the key, and if the innkeeper were to allot to the traveller a locker in the corridor or in the sample-room of the hotel for the purpose of holding his goods it would not, in my opinion, prejudice or affect the lien over them, even though the sacred word "demise" were used to describe the transaction, more especially if that "demise" was specifically for the sole purpose of holding goods which were to remain subject to the lien. But, although the innkeeper not only may but under certain circumstances must thus leave the goods in the actual possession of the owner, there are limits which he may not pass without losing his lien. He must not permit the traveller to take the goods out of the inn, or, to put it more generally, he must not do anything that amounts to an abandonment of the power to exercise his right of retention.

Let me now consider the case of a railway company, which in my opinion bears a close analogy to that with which I have

just dealt. The railway company is entitled to retain the goods until the freight charges are paid. Meanwhile it may permit the owner of the goods to have access to them and to exercise the ordinary rights of an owner so far as they are compatible with this right of retention. For example, to prevent unnecessary detention of the trucks, the goods must be unloaded. The railway company may—and perhaps might be required to—permit the owner to perform this operation by his own servants. If they are to be stored in the station yard, it may well be for the owner to do this also, and while stored the owner may have access to them and perform such operations as bagging or sorting. During all these operations the goods are, in a sense, in the actual possession of the owner by his servants, and yet the lien is not endangered thereby, because there is nothing that indicates or amounts to any abandonment of the power and right of the railway company to retain the goods until its lien is satisfied. I may take a more general case. A railway company might make a practice of collecting the freight charges at the gate of the station yard and enforce that collection by refusing to allow goods to leave the station yard until the charges were paid. That would be a practical and legitimate mode of enforcing its lien, and is in fact adopted in practice to a great extent by the custom of stationing a gatekeeper at the door of the station yard, whose duty is to refuse to allow any goods to pass the gate without a proper permit. Meanwhile the railway company might allow the owner within the station yard to handle the goods freely, to sort, bag, or pack them, to load the goods by his own men on his own carts and draw them by his own horses to the gate of the station yard. During all that time the goods might have been in the de facto possession of the owner and his servants for the above purposes. All this would not constitute a waiver of the lien, because there would have been nothing which amounted to or even evidenced the abandonment of the power to detain the coals until the freight was paid.

So far I have dealt with the general law applicable to the case. I shall now turn to the actual facts.

Frederick Lord, the bankrupt, was a coal merchant at Norwich who was in the habit of receiving large consignments of coal

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over the defendants' railway. On February 19, 1903, he applied to the defendants to have a ledger account opened with them, i.e., an arrangement by which the freight charges should be paid at certain dates, instead of being payable on or before the delivery of the goods in respect of which they were incurred. This was granted on the terms that the defendant company should have "a continual lien upon all waggons goods mineral articles and things" of the bankrupt hauled or conveyed on their lines "or which shall be at any time upon the railway or upon any ground allotted by or rented of the company for all tolls rates charges and moneys which shall be or become due or payable to the company as well as in respect of the particular waggons goods minerals articles and things which shall at any time have been hauled or conveyed along or be upon the railway." The arrangement was, therefore, an instance of the general type which I commenced by describing, and presents, so far as I see, no special features.

It is true that the lien extends to goods at any time on the railway, or on grounds allotted by or rented of the company, whether those goods have been hauled or not. But it is admitted that all such goods must have been brought upon the premises of the company and could only have been so brought by its permission, and it was entitled to stipulate what those terms should be. If, therefore—as is the case—it stipulated that they should fall under the lien for unpaid charges, there is nothing illegal or unreasonable in its so doing, nor is there anything which puts these goods in a different position with respect to lien from that of goods hauled. A lien in the strictest sense of the word can be given by agreement just as much as by statute or by common law, and the legal incidents are the same in both cases. If the circumstances are compatible with the maintenance of the lien in the one case, they will also be in the other.

During the currency of this agreement the bankrupt hired from the defendants certain plots within the station yard of their Victoria Station at Norwich for the purpose of storing the coal brought by the railway. It will suffice to refer to one of these hiring agreements, inasmuch as the agreements relating to all the plots so taken are in identical terms. I will take, therefore, the

agreement of September 6, 1904. It is an agreement for letting the plots delineated and shewn on the plan annexed to the agreement. These are plots situated wholly within the station yard of the defendant company at Norwich, adjoining their coal sidings and completely surrounded by land of the company. The land is by the terms of the agreement to be occupied "for the purpose only of stacking and dealing with coal and coke passing over the company's railway." All these hiring agreements for plots to be thus used as coal bunkers for his coal are subsequent to the agreement for the running account, which provided that coal stored on "ground allotted by or rented of the company" should be subject to its lien. There is nothing in the hiring agreements inconsistent with this earlier agreement between the parties, which was in force when they were signed, and which referred to all such hirings as might in future be made. Indeed, these hiring agreements are obviously intended to carry into effect that agreement. The land must therefore be held to have been taken on the terms that coals stored on it should be subject to the lien of the company, just as completely as if the express condition that it should be so subject had been written afresh in the hiring agreement itself.

There are other conditions in the hiring agreement which are not without importance. In case of the breach of any of the conditions it can be terminated immediately by the company by notice, and either party may at any date determine it by one month's notice. The bankrupt undertakes to pay in respect of all traffic passing over the lines of the company from or to the plots hired the same rates as he would have paid had the traffic been accommodated or dealt with by the company at their Victoria Station. In other words, no deduction from freight charges is to be made in respect of his having thus secured the appropriation of a special plot of ground within the station yard for stacking his coal. I shall not stop to examine these conditions further, because in my opinion it is unnecessary for the decision of the question in issue to do so.

In the month of October, 1906, Lord failed to make to the defendant company the payments due in respect of his running account. As he had been in arrear for some time, the

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defendant company proceeded to exercise their lien by giving orders that no coal consigned to him or stored on his allotments should be allowed to leave the station yard until the account was paid. This is the act complained of by the appellants. It is not denied before us that this would be the proper way of enforcing a lien if it existed. The sole contention raised has been that this lien did not exist because the agreement creating it was void as an unregistered bill of sale.

As to the coal on trucks upon the line of the defendant company, no appeal has been brought from the decision of the learned judge, who held that the defendant company had a clear right at any moment to interfere with its being touched. The question on the appeal has been as to the coal on the allotments. It is contended on behalf of the appellant that the fact that the land on which the coal was stacked was in the occupation of Lord under a hiring agreement made the agreement for a lien on the coals void as an unregistered bill of sale. The learned judge, rightly in my opinion, took into consideration all the circumstances of the case and held that, as the allotments in question were entirely surrounded by the premises of the defendant company, and that it had and exercised control of all access to them, including locking the gates at certain hours of the day and night, and as these allotments could only be approached by going over the lands belonging to the defendant company over which Lord had no right to take goods, there was no such parting with possession of those goods by the company as would prevent its exercising its lien. If he was right in so holding, as in my opinion he was, the contention that the agreement was a bill of sale necessarily fails.

Speaking for myself, I cannot see that the quantum or the nature of the interest in the soil which was possessed by Lord can affect the question. The material fact is the legal position of goods placed thereon. So far as it is a question of agreement it is admitted that Lord held the land solely on the terms that the coal taken from the surrounding lands of the defendant company and placed there should continue subject to the company's lien, i.e., should still remain in their possession. To succeed the appellant must and does say that this is impossible

in law—that there is an irresistible presumption in law that goods placed upon land are in the actual possession of the owner of the soil, and that this presumption overrides even the express terms of the demise under which he holds it. Unless this is a presumption juris and de jure, I fail to see that the company had parted with anything that was material to its lien. Neither law nor equity would give to Lord the right to pass over the defendant company's land, which surrounded the bunkers on all sides, in order to take the goods away without paying the sum due, for to do so would be to violate the express conditions under which he obtained his very limited rights of user of the land. The de facto power of the defendant company to retain the goods was therefore undiminished. Moreover, the placing the coal upon the allotments made no change in the degree of actual possession of the goods which Lord enjoyed as measured by what he could do with them. It is not suggested that he could do any act upon the land which he might not have done had the land not been demised but had merely been allotted to his use by the company. Nor can I see that such degree of actual possession of the goods as Lord enjoyed was any more inconsistent with the retention of the goods by the company than the actual possession and user of his luggage by the traveller in the case of the innkeeper's lien. If the company had permitted Lord to erect a corn-bin on their land and use it and keep the key of it so long as he paid a fixed yearly sum, he would have been in actual possession of the corn to a like degree, whether this was done by demise of the land on which it stood or not. But can any one say that the exclusive user of such a corn-bin within the premises of the defendant company would indicate or amount to an abandonment of the right to retain. The test is whether the defendant company permitted the goods to pass into the uncontrolled possession of the owner. In this case the company did nothing which in fact diminished its power to prevent the owner from doing as he would with the goods in the sense of taking them into his uncontrolled possession, and therefore did nothing inconsistent with the maintenance of its lien. Suppose that it had been the custom of the railway company to enforce its lien

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by refusing to permit goods to pass out of the gate of the yard over which it had and exercised full control) until the charges were paid. Could a customer have insisted on taking his goods through the gate without paying the charge, on the ground that while within the ambit of the station yard they had been stored on a plot of which he enjoyed a greater or less exclusive possession derived from the railway company on the express terms that it should only be used for storing goods subject to the company's lien?

The point may be put in another way. Let us consider what rights Lord acquired under the demise. In the first place, that demise was solely for the purpose of "storing and dealing with" the coal—the more general word "dealing" clearly meaning the right to perform such operations as sorting, bagging, &c., which were compatible with the coal still remaining on the allotment. Moreover, the tenancy was obtained from the company subject to the prior arrangement whereby coal so stored on the land should remain subject to the pre-existing lien, i.e., that it should remain in the possession of the company, because the existence of a lien implies possession in the sense that I have explained and cannot exist without it. Hence by the agreement of tenancy the tenant acquired no right of doing anything inconsistent with the preservation of the possessory lien of the landlord, and on the other hand the landlord lost no power of doing anything the doing of which was essential to the preservation of that lien. I do not stop to inquire whether any and what special powers were thus essential or not. It suffices to say that, if there were any, the position of the company with regard to the possession of those powers was not affected by the agreement of tenancy. In this there is nothing which is inconsistent with the existence of a demise. It is the goods with which we are concerned, and not the land. Property in the soil does not necessarily carry with it exclusive possession of all things placed upon it. Suppose that a stonemason holds his yard by licence and not by demise. Could the owner of the land say that the stone lying thereon was in his possession? If, on the other hand, I let a farm to a tenant on the terms that I may use a particular field to store the hay cut upon Whitsuntide, that hay

when placed on that field does not pass out of my possession by reason of the demise. The law will imply the reservation of such powers or easements as are necessary for putting the hay on the ground and taking it off again, and it would not be held to have left the possession of the owner or to have passed into the possession of the tenant of the land. So here, the demise is of a plot wholly within and surrounded by the station yard and is on the express terms that the goods stored shall remain subject to the railway company's lien. The hirer cannot therefore set up any rights arising out of the creation of that particular tenancy which would negative such continued possession by the railway company of the goods stored as is necessary for the continuance of such lien. All his rights in the land come from the railway company and are only such as are given by and consistent with his agreements with them.

In my opinion, therefore, neither by the intention of the parties as expressed in the agreement, nor by necessary intendment of law, nor in fact, did the storage of the coal on the allotments constitute any termination of such possession of the coal by the defendants as was necessary to maintain their lien. The rights acquired by Lord under the demise were subject to and not in conflict with the continuance of that possessory lien, and, therefore, for the purpose of that lien the land was in the same position as though it had not been demised. The placing of the goods on those plots, so far from allowing them to pass into the uncontrolled possession of Lord, did not, so far as I can see, add anything either in fact or in law to his pre-existing powers of dealing with them, except so far as the allotment of a plot for his special use gave him increased business conveniences. It follows from these conclusions that in my opinion the agreement as to the lien is not within the Bills of Sale Acts at all. As I have said, a lien gives no property in the goods, nor does it entitle the holder to take possession of the goods, for it implies that they are already in his possession in the sense that I have explained, and not in the uncontrolled possession of the owner. Hence an agreement for a lien does not come under the earlier words of the definition in s. 4 of the Bills of Sale Act, 1878. This part of the definition was, indeed, but slightly relied on (if at all) by the counsel for the

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appellant. But it was urged that it came within the words "any agreement . . . . by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred." To my mind it is impossible that those words can apply to the present case, because the claim of the defendant company is, in the first place, not a claim in equity at all, and, in the second place, is not a claim to a charge or security on the goods. It is simply a right, wholly legal in character, to prevent the goods passing into the uncontrolled possession of the bankrupt. It does not constitute a charge or security, for if the goods do pass into that uncontrolled possession by any means, all right or claim under the lien vanishes, even though it has occurred by accident and has not been due to any intention of abandoning the lien. This being so, it appears to me that we have not to regard the Bills of Sale Act in any way, and the rights of the parties are regulated by their contracts, which in themselves are in no wise contrary to law or public policy and are therefore valid, and which undoubtedly give to the railway company the right to prevent the coal in question being taken out of their station yard without payment of the balance of their account. This is all that the lien means, and it is for the purposes of the present case all that the defendant company have asserted or enforced.

In my opinion, therefore, such a document as we have here is not within the language of the Bills of Sale Acts by reason of its creating a lien. But it is also not within the spirit or intention of those Acts. They are not aimed at liens, but at transactions of an opposite type. A lien is impossible except under circumstances which place the goods in what I may call the possessory control of the holder of the lien, that is to say, where they are so far in his actual possession that he can prevent their being taken away and dealt with by the owner. The goods are for the purpose of the lien in his possession—i.e., he has a de facto control of the possession of the goods which overrides the rights of ownership of the owner so far that the holder of the lien can prevent even the owner from taking them out of that possession. But the evils at which the bills of sale legislation was aimed were mainly characterized by attempts to acquire property in personal

chattels without possession. A lien, on the contrary, is characterized by possession without property. It would, therefore, in my mind, be a departure from the spirit as well as the letter of the Bills of Sale Acts to attempt to bring within their scope business arrangements of the kind we have here. Least of all can I bring myself to believe that the question of whether an agreement is a bill of sale or not can turn on a question of quantum of interest in the land upon which goods are placed. The rights of user of that land and the consequences of the goods being thereon may be of relevance, but when those are decided the ownership of any particular interest in the land appears to me to be necessarily irrelevant.

The learned judge rightly placed much reliance on the case of *Spencer* v. *Midland Ry. Co.* (1) This was a case precisely like the present, except that the land was held under a licence and not under an agreement of tenancy; but I can see no practical difference between the limitations of the powers of the owner over the goods or of his rights of user of the land in that case and the present. The Court, consisting of Lord Russell C.J. and Charles J., held that the document was not a bill of sale on the specific ground that it conferred no rights in equity, and there is nothing in the judgment of the Court of Appeal upholding their decision which indicates any disagreement from that ground, although, in the very imperfect report of that decision which alone exists, Lord Esher M.R. seems to have based his judgment on the ground that the land in question was still in the occupation of the railway company, so that the specific question raised by the present case did not arise.

I am therefore of opinion that the defendant company possessed the lien that they claimed both over the goods in trucks and those on the allotments, and that this appeal should be dismissed with costs.

BUCKLEY L.J. The question for decision is whether the ledger credit agreement of February 19, 1903, is by virtue of article 3 of the annexed conditions a bill of sale. To solve this question it is necessary, first, to investigate another, namely, in whose

(1) 11 Times L. R. 408, 542.

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possession upon October 15, 1906, was the coal then lying upon the allotments? The allotments were demised to Lord by the agreement of September 6, 1904. That was an instrument by which the company let the allotments to Lord as tenant at a rent free from rates, and the tenant was restricted as to the manner in which he was to occupy the land. He was precluded from underletting it, and in certain events was to quit and give up possession of it, and in certain events the company had the right to re-enter and take possession, and if the tenant held possession contrary to the terms of the agreement and after the legal termination of his tenancy he was to pay a certain sum as mesne profits. It was suggested, but scarcely argued, that this was not a demise, but a licence. In my opinion it was plainly a demise and created in the tenant an estate in the land. The coal in question was the property of Lord; it was delivered to Lord and stacked by him upon the land so demised to him. The question of possession is, as any one will realize who reads the first few pages of Pollock and Wright on Possession, a subject in some cases of great difficulty, but I do not think there is much difficulty in this case. The possession was, I think, plainly with Lord. Did Lord then hold possession on his own behalf or as agent or servant of some one else? It is suggested that the coals, having been subject in the hands of the railway company in transit to a carrier's lien, were delivered to Lord and stacked upon his land as goods upon which that lien existed, and that (if I understand the contention) the goods must, to the extent of the lien, be taken to be goods in the possession of the railway company stacked upon Lord's land, and in respect of which he held possession for the company. In my opinion this is not so. The carrier's lien is a possessory lien. A possessory lien is a right attaching to the physical possession of a physical subject-matter. There cannot be a possessory lien of a right or interest. The goods when delivered to Lord were, no doubt, contractually under the ledger credit agreement subject to a lien in favour of the railway company, but this was a lien arising by contract and was an equitable right against goods which were in the possession of Lord. Next it is said that the allotments in question were surrounded by lands of the railway company, and that the coal

could not have been removed because for removal it must have been taken over the land of the railway company, and physically the railway company could have prevented its removal, and did during some part of the twenty-four hours prevent its removal by closing the gate. These facts are not, to my mind, relevant to the question of possession. I will test it in this way. Suppose that Lord had paid all sums due from him to the railway company and proposed to remove his coal; could he have done so and have used the roadways for the purpose? Plainly, yes. The demise by the railway company to him included by implication a right to use the roadways for the purpose of access and removal. If the facts were that he owed the railway company money, no doubt they could prevent the removal, but not because of the physical position of the demised land, but by reason of the fact that the company contractually had under its lien an equitable right to the goods. Their remedy would have been by an action to enforce their lien, and as ancillary thereto an injunction. In my judgment the coal upon the demised land was in the possession of Lord, and the rights of the railway company against it were rights arising contractually under article 3 of the conditions to the ledger credit agreement.

Upon the question whether the ledger credit agreement is a bill of sale or not this question of possession is, I think, vital. If, as in *Spencer* v. *Midland Ry. Co.* (1), the possession was with the railway company and the goods were on the railway company's land under a licence only, that decision would have applied. In my opinion the cardinal difference here lies in the fact that the goods upon the demised land were in Lord's possession, and that the rights of the railway company against them under the ledger credit agreement were, in the language of the Bills of Sale Act, either an assurance of personal chattels or a licence to take possession of personal chattels, or an agreement by which a right in equity to personal chattels, or a charge or security thereon, was conferred.

I add a further point. The ledger credit agreement gives a lien upon all goods upon the ground rented of the company, so that if Lord had brought upon the demised land goods which

(1) 11 Times L. R. 408, 542.

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had never been carried by the railway company at all the lien would have attached upon those. The clause seems to me to be one which creates in favour of the company upon chattels in the possession of the debtor a security in favour of the company, and as such it seems to me that it is a bill of sale. In my judgment, therefore, the appeal must be allowed.

Appeal allowed.

The appeal was then directed to stand over to be argued upon the further points decided by Phillimore J.

March 20. The question as to the right of the trustee in bankruptcy to sue for the 50*l.* and the 25*l.* was now argued.

Upon this part of the case the Court, without expressing any opinion on the question whether the cause of action vested in the trustee or not, came to the conclusion upon the facts that the plaintiff was not entitled to any damages beyond the proportionate share of the 520*l.*, the agreed value of the coal, attributable to the coal in the allotments, to which alone under the previous decision of the Court the plaintiff was entitled.

The question as to the defendants' right of set-off was next argued.

Scrutton, K.C., and *Coller*, for the defendants. The defendants have a right of set-off under the mutual credit section (s. 38) of the Bankruptcy Act, 1883. That section extends to unliquidated damages: *Peat* v. *Jones* (1); *Jack* v. *Kipping* (2); and the same principle has been applied to claims in the winding up of a company: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3) The learned judge was wrong in holding that the claims must arise out of the same transaction in order that the section may apply. It applies to any case in which the dealings on each side would result in a money claim: *Eberle's Hotels and Restaurant Co.* v. *Jonas.* (4)

Frank Mellor (*H. Reed, K.C.*, with him), for the plaintiff.

(1) (1881) 8 Q. B. D. 147.
(2) (1882) 9 Q. B. D. 113.
(3) (1882) 9 Q. B. D. 648; (1884) 9 App. Cas. 434.
(4) (1887) 18 Q. B. D. 459, 465.

There is no case which has decided that a claim for damages in respect of a tort can be the subject of a set-off, and the reason is that damages for a tort do not fall under the description of debts provable in bankruptcy: see s. 37 of the Bankruptcy Act, 1883. In *Jack* v. *Kipping* (1) the misrepresentation for which damages were claimed related to the sale of a chattel and was treated by the Court as a breach of the obligation arising out of the contract for sale, and that distinguishes that case from the present. The plaintiff's claim here is a simple claim for trespass and conversion; it is a mere claim for tort, and has nothing to do with any contract. Further, although the claim is not in form a claim in detinue, since the goods have been sold, still that is the substance of the claim, and, treating the claim as a claim for the return of the coal, there can be no set-off between goods and money. The two claims are incommensurable: *Eberle's Hotels and Restaurant Co.* v. *Jonas* (2); *Palmer* v. *Day & Sons.* (3) In determining whether there is any right of set-off under this section the date to be looked at is the date of the receiving order: *In re Daintrey.* (4) There were here no mutual dealings within the meaning of the section: *In re Mid-Kent Fruit Factory* (5); *In re Winter* (6); *In re O'Shea's Settlement.* (7)

Scrutton, K.C., in reply. If the plaintiff had brought his action for detinue the defendants might have had a difficulty in asserting a right to set-off, but having brought his action for conversion, that difficulty does not arise, because the mutual dealings are capable of resulting in a money claim on each side.

Cur. adv. vult.

March 28. COZENS-HARDY M.R. It follows from the decision of this Court that the seizure of the coals on the allotments demised to Lord was wrongful. The seizure was on October 15, 1906. A few days later Lord presented a petition on which a receiving order was made, and in due course Lord was adjudicated bankrupt. The trustee disputed the right of the railway

(1) 9 Q. B. D. 113.
(2) 18 Q. B. D. 459, 465.
(3) [1895] 2 Q. B. 618, 622.
(4) [1900] 1 Q. B. 546.
(5) [1896] 1 Ch. 567.
(6) (1878) 8 Ch. D. 225.
(7) [1895] 1 Ch. 325.

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company to seize the coals and claimed them on behalf of the estate. In January the coals were sold by arrangement and without prejudice. We have already decided the amount to which the trustee is entitled in respect of the seizure of these coals. But it is not disputed that there is a provable debt due to the railway company for a much larger amount, and the railway company contend that they are entitled to a set-off by reason of s. 38 of the Bankruptcy Act on the ground that there were "mutual dealings" between Lord and the railway company. In my opinion this contention ought not to prevail. At the date of the receiving order the state of things was this. Lord owed a large sum of money to the railway company. On the other hand the railway company wrongfully had possession of part of Lord's assets. You cannot set off goods against money: *Eberle's Hotels and Restaurant Co.* v. *Jonas.*(1) Nothing was done by Lord to waive his right to the goods and to elect to claim damages for conversion instead, and the right to set off as distinct from the ascertainment of the amount to be set off must be settled once for all on the date of the receiving order: *In re Daintrey.* (2) Nothing done subsequently by the trustee could confer a right of set-off if no such right previously existed. Moreover, I think it would not be reasonable to hold that the sale by arrangement and without prejudice, even coupled with the fact that the trustee in the present action claimed not in detinue but for conversion, could in any way prejudice or affect the title of the trustee.

In the view which I take it is not material to consider whether in the circumstances of the present case, if the coal had been consumed by the railway company before the date of the receiving order, damages for wrongful conversion could have been the subject of set-off. I desire to express no opinion on that point.

The counter-claim, so far as the set-off is concerned, must be dismissed. As Phillimore J. held that the seizure of the coals was justified, no question of set-off arose before him, but he intimated that his view was in accordance with that which I have expressed.

(1) 18 Q. B. D. 459. (2) [1900] 1 Q. B. 546.

FLETCHER MOULTON L.J. I am of the same opinion.

There can be no doubt as to the nature of the right of action in respect of the coal which vested in the trustee upon his appointment. The railway company did not deny that the coal was the property of Lord and therefore passed to his trustee, but they claimed a lien upon it, i.e., a right to retain it until their charges were paid. Accordingly they had closed their gates, and they refused to allow the trustee to take the coal away until he paid the amount of those charges. But it is not, and never has been, suggested that they ever made any claim to the possession of the coal otherwise than under that alleged lien, or that they were not ready to give up the coal to the trustee on payment of the amount due. The right of action, therefore, that then vested in the trustee was one of detinue, and was regarded by the parties as such.

Nor can I find anything in the subsequent acts of the parties which altered the nature of that right of action. It is true that the coals were in fact sold, but that was with the concurrence of both parties and for their mutual convenience. Neither party desired that the coal should remain in specie—they alike desired that it should be changed into money. Accordingly by agreement the coal was sold, and the proceeds paid into a bank in joint names to await the determination of the legal rights of the parties. It is impossible to construe such a sale into an act of conversion or indeed into any tortious act at all on the part of the railway company, because ex concessis it took place with the consent and concurrence of the owner. Its sole effect was to substitute the proceeds of the coal itself without otherwise affecting the legal rights of the parties or the legal consequences of those rights. Such arrangements are common in the case of disputes as to the possession of cumbrous goods, and the Courts favour them and give to them the fullest effect in the interest of all parties, inasmuch as they tend to diminish useless costs. Accordingly the Courts scrupulously respect and enforce the condition that underlies them all, namely, that they are wholly without prejudice to the rights of the parties. The trustee's right of action therefore remained and still is one of detinue for the coals, although a judgment that he do recover them will

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by consent operate on the proceeds and not on the coal itself. And it has in substance been fought as such. It is true that the pleadings are not very skilfully framed in this respect, but that is a matter of slight importance when it is so clear that the aim and intention of both parties to the transaction was to maintain and enforce their original rights. The whole of the argument before us turned on the right of the railway company to retain possession of the coal as against the trustee, and the judgment in the action is in substance a judgment that the trustee is entitled to such possession, and the giving up to him of the corresponding proportion of the moneys in the bank is by reason of the arrangement made between the parties the equivalent of the surrender of the coal as to which he has succeeded.

We must therefore treat this action as being in substance an action of detinue for the coal. The Court in the case of *Eberle's Hotels and Restaurant Co.* v. *Jonas* (1) decided that in the case of such an action no set-off under s. 38 of the Bankruptcy Act can be pleaded. The trustee is therefore entitled to a clean judgment for the sum which represents the proceeds of the coal on the allotments, and the counter-claim must be dismissed as being a claim in respect of a provable debt which cannot be pleaded by way of set-off to the plaintiff's claim.

BUCKLEY L.J. At the date of the receiving order there was due from Lord to the Great Eastern Railway Company a sum of 1138*l.* in respect of a "dealing" between the two parties, namely, contracts for carriage of coal. At the same date the railway company were in possession of goods, namely, coals belonging to Lord which they had seized on October 15, 1906, claiming to be entitled so to do under the ledger credit agreement. This constituted another "dealing" between the parties. There were, therefore, "mutual dealings" within s. 38 of the Bankruptcy Act, 1883. As regards the latter the facts were that the railway company had seized the goods, and, as we have held, had seized them wrongfully, and that Lord was at the date of the receiving order in a position to bring detinue. But nothing, so far as I see, had happened giving him a right to sue the company for

(1) 18 Q. B. D. 459.

damages for conversion. The right to set-off under s. 38 must be determined according to the state of facts at the date of the receiving order, and only claims which resulted in pecuniary liabilities at that date (including claims for damages unliquidated at that date) can be the subject of set-off under the section. At the date of the receiving order Lord's right under the second "dealing" was, I think, a right to the return of the goods. The company's right as against him was a right to money. These cannot be set off: *Eberle's Hotels and Restaurant Co.* v. *Jonas.* (1)

Upon this short ground it seems to me that the claim to set-off fails.

The Court gave to the plaintiff two-thirds of the costs of the appeal and also gave him the general costs of the action and of the counter-claim, and they gave to the defendants the costs of those issues upon which they had succeeded at the trial, such costs to be set off against the plaintiff's costs.

Solicitors: *Tarry, Sherlock & King, for E. E. Blyth, Norwich; Edward Moore.*

(1) 18 Q. B. D. 459.

H. B. H.

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Feb. 27; *March* 28.

JOHNSON *v.* KEARLEY.

Stock Exchange—Principal and Agent—Right of Broker to Indemnity from Client—Payment made by Broker without Client's Authority.

A broker when acting as agent must faithfully and accurately inform his client what the real transaction is that he has entered into for him, and in default of his doing so he cannot maintain an action against the client in which he seeks indemnity from him for moneys paid for him in obedience to his instructions. The implied contract of indemnity in the case of principal and agent is that the principal will indemnify the agent against liability incurred by him under the contract which he is instructed to make by his principal, but not against a payment made by him without authority.

The defendant instructed the plaintiff, a stockbroker, to buy for her certain shares on the Stock Exchange. The plaintiff purchased the shares through a firm of stockbrokers who were members of the London Stock Exchange. The London brokers bought the shares from a jobber at $98\frac{7}{8}$ and sent a bought note to the plaintiff charging him "$98\frac{1}{2}$ net" for the shares, the price at which they had bought of the jobber not being disclosed. The word "net" meant the jobber's price plus the London brokers' remuneration. The plaintiff sent a bought note to the defendant charging her $98\frac{1}{2}$ (not adding the word "net") plus his commission of 7*s.* 6*d.* In an action by the plaintiff to recover from the defendant the sum the plaintiff had paid to the London brokers for the shares:—

Held that (assuming the London brokers only added to the jobber's price such a sum as was a reasonable reward for their work), in the absence of proof of a custom on the Stock Exchange that the London brokers could add something to the jobber's price by way of remuneration or profit and call it "net" without disclosing to the plaintiff what that addition was, the action would not lie.

Held, further, that the defendant was not liable to the plaintiff for the sum claimed in the action less such amount as represented the London brokers' addition to the jobber's price, inasmuch as, in order to succeed, the plaintiff must prove that he had carried out his client's instructions, and that the moneys that he had paid for her were paid within the authority with which she invested him. Having knowingly departed from his instructions, he could not recover anything.

FURTHER CONSIDERATION.

The action was brought by the plaintiff Johnson to recover 549*l.* 17*s.* 4*d.*, being the alleged balance due to him by the defendant in respect of purchases and sales by the plaintiff as a

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stockbroker on behalf of the defendant. By the statement of defence the plaintiff was put to the proof of his claim, and alternatively it was alleged that the transactions between them were gaming and wagering within the statute. The action was tried with a special jury before Bucknill J. at the Devon Assizes, and the jury found against the defendant on the defence of gaming and wagering. During the trial the plaintiff, who gave evidence, said that he was a broker at Plymouth, and that in February, 1907, he commenced business as a stockbroker on his own account; that he sent to the defendant and others a circular dated February 8, in which he stated that he had made arrangements with a London firm of authorized brokers which would secure for his clients the advantage of having all business transacted upon the very best and safest terms; that in May, 1907, the defendant gave him an order to buy for her some shares on the Stock Exchange, which he purchased through a firm of stockbrokers who were members of the London Stock Exchange; and that that order and all subsequent orders given by the defendant were carried out through the same firm and according to the rules and customs of the house. What happened was this, he said: "I sent her orders to my London agents of the London Stock Exchange, and they sent me a contract note in the usual form. They charged me no commission. They agreed to deal with me on the terms of a net price." To take one instance as a general example, on May 3, 1907, the defendant signed, by her agent, a written order addressed to the plaintiff, "I buy for fortnightly settlement ten Atchisons at best." That order the plaintiff sent on to the London brokers, who, in their turn, dealt with a jobber and bought the shares at $98\frac{7}{16}$, and then wired to the plaintiff that they had carried out the order at $98\frac{1}{2}$ "net." The same day they sent to the plaintiff a bought note, "Bought for account of F. Johnson, Esq., subject to the rules and customs of the London Stock Exchange, ten Atchison, &c., shares at $98\frac{1}{2}$ net, 197*l.*, for account May 15." The plaintiff continued, "I don't know what they, the London brokers, made. 'Net' means that all I charge for commission is my own. I don't know what they do. They must explain that. Then I sent the contract note to

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the defendant." That note was in this form, "Bought for account of Mrs. Kearley subject to the rules and customs of the London Stock Exchange, ten Atchison, &c., shares at 98½, 197*l.*; commission, 7*s.* 6*d.*; stamp, 1*s.*—197*l.* 8*s.* 6*d.* For settlement May 15." The plaintiff stated that in every case he had paid the London brokers regularly every fortnight. On cross-examination he said that the defendant instructed him to buy for her on the Stock Exchange at the price of the day, but he could not say if he always charged her such prices, but he charged her what the London brokers charged him, who probably bought at the market price and added their profit. Then a member of the firm of London brokers, Lumsden & Co., gave evidence, and he stated that the transactions with the plaintiff were carried out according to the rules of the Stock Exchange in every case by making a contract with a jobber in the usual manner. He stated also that the arrangement between his firm and the plaintiff was that his firm should charge the plaintiff a price to include their remuneration, and that remuneration was arrived at according to how the bargain with the jobber appeared, that is, that sometimes they charged no remuneration, their intention being that the business should appear well done, and that they would charge their commission accordingly. He repeated that "net" price meant the purchase price plus their remuneration, and that they had no fixed scale of commission. On cross-examination he stated that the plaintiff would not pass on to the defendant the actual price at which his firm, the London brokers, bought from the jobber. At the end of the plaintiff's case it was urged on behalf of the defendant that she was entitled to repudiate all liability on the ground that, on the evidence, the plaintiff had not charged her the price at which the London broker had bought for her, but that something had been added to it of which she knew nothing and which she had not ratified, and therefore that the plaintiff could not maintain the action. It was agreed that the jury should decide the facts on the question of wagering, and that, if it became necessary, Bucknill J. should decide this other question, with liberty to draw inferences of fact. The jury found that the transactions were not gaming and wagering.

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Foote, K.C., and *W. T. Lawrance*, for the plaintiff. The plaintiff carried out the instructions of the defendant to buy stocks and shares on the Stock Exchange on her account, and they were effected at the best price of the day. The London brokers, who could not be expected to work for the defendant for nothing, only added to the jobber's price a reasonable sum for their own remuneration. That the defendant was bound to pay.

McLeod, K.C., and *J. A. Hawke*, for the defendant. The defendant has been charged two commissions which she never agreed to pay, namely, one commission to the plaintiff and another commission to the London brokers, who had charged what they liked from time to time without disclosing to the plaintiff or to her the nature of the charge. The plaintiff was bound, as the defendant's agent, to pass on to her the real contract of the purchase of stocks and shares. That he has failed to do, but has passed on another contract at a higher price, that is, the real purchase price plus the London brokers' remuneration, whatever they chose to charge for doing their work. For example, the real purchase price of the ten Atchison shares from the jobber was $98\frac{7}{16}$, but the London brokers' bought note sent to the plaintiff was $98\frac{1}{2}$ net, and the plaintiff's bought note sent on to the defendant was $98\frac{1}{2}$ without the word "net." Therefore the plaintiff was passing on to the defendant not the real price at which the shares were bought from the jobber, but another price on which he charged her his commission as well, so that he was charging her a commission on the original price and on the London brokers' remuneration, the amount of which she had no knowledge of and which she never ratified. Further, the plaintiff bought as a principal and not as the defendant's agent, and the action is therefore misconceived.

Cur. adv. vult.

March 28. The following judgment was read by

BUCKNILL J., who, after stating the facts and arguments, continued: On the facts which I have stated there can be no doubt that the plaintiff was the agent of the defendant to buy stocks and shares on her behalf through brokers on the London Stock Exchange, and that he accepted that position

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and carried out her orders by passing them on to the brokers in London, who in their turn dealt with a jobber in the usual way and according to the rules and customs of the London Stock Exchange. In my opinion, each transaction with the jobber should have been transmitted by the London brokers to the plaintiff at the purchase price, and, if and when the London brokers made a specific charge for work done by them, such charge should also have been clearly notified to the plaintiff and by him to his principal, the defendant, who might or might not have agreed to it, but, instead of that, the jobber's price was never passed on by the London brokers to the plaintiff, or by him to the defendant. Indeed the plaintiff did not profess to know what, in the several transactions that he carried out for the defendant, the jobber's price was, although he had reason to believe that it was not the price that he passed on to the defendant, and yet the price which he debited to her in his contract note purported to be the jobber's price, for he left out the word "net," which, had it been retained, might have put the defendant on inquiry as to its meaning. On these facts can the Court decide that, supposing the London brokers only added to the jobber's price such a sum as was a reasonable reward for their work, the plaintiff could recover it from the defendant in this action by way of indemnity for money paid for her, or, failing that, can the Court give judgment for the plaintiff for the sums claimed less such sum as represents the London brokers' addition to the jobber's price? I am of opinion that it cannot take either course. If there existed a custom on the Stock Exchange that in such cases the London brokers could add something to the jobber's price by way of remuneration or profit, and call it "net" without even disclosing to the other broker what that addition was, this principal might be liable, even although she was ignorant of the custom; but no such custom was proved. And, on the alternative case, I am of opinion that the defendant is not liable to the plaintiff even if the London brokers' addition to the jobber's price should be deducted, because to succeed in this action the plaintiff must prove that he has carried out his client's instructions and that the moneys that he has paid for her were paid within the authority with

which she invested him. Having knowingly departed from his instructions, he is, in my opinion, not entitled to succeed at all in this action that he has brought. I regret the necessity of my judgment in this particular case, seeing that the defence of gaming, which was the main defence to the action, did not succeed, the jury not accepting the testimony of the defendant or her principal witness; but I repeat what has been laid down before in these Courts in reference to Stock Exchange transactions between a broker and principal, and that is that a broker when acting as agent must faithfully and accurately inform his client what the real transaction is that he has made for him, and that in default of his doing so he cannot recover in an action against him the keynote of which is that he seeks indemnity from him for moneys paid for him in obedience to his instructions. The implied contract of indemnity in the case of principal and agent is that the principal will indemnify the agent against liability incurred by him under the contract which he is instructed to make by his principal, but not against a payment made by him without authority. The case of *Stange & Co.* v. *Lowitz* (1) was cited by counsel for the defendant. That was an action by outside brokers against a customer. The plaintiffs not only charged the defendant a broker's commission, but had themselves added in the contract notes which they sent to the defendant something to the price at which they had bought through a member of the Stock Exchange, and on that ground the defendant claimed to repudiate all transactions where that had been done. It appears from the report of the case that at the trial the plaintiffs asked that these additions should be deducted from their claim, and that judgment should be in their favour for the balance, and Ridley J. gave judgment for such amount. But the Court of Appeal reversed that decision and gave judgment for the defendant. The facts of that case were different to the facts in this. There the plaintiffs had in fact purchased through a London stockbroker 100 Louisville shares at $60\frac{9}{16}$, but they (the plaintiffs, not the London broker) had charged their client, the defendant, $60\frac{10}{16}$, as also their brokerage on that sum. So that the defence was

(1) (1898) 14 Times L. R. 468.

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twofold, for either the defendant could repudiate the transaction on the ground that the plaintiffs were selling to him as principals, or on the ground that they were charging a secret profit.

The case of *Nicholson* v. *Mansfield & Co.* (1) was also referred to in argument. There the action was brought by the client against a firm of outside brokers, alleging that he had paid the defendants moneys on the faith of representations that the defendants had made contracts with members of the Stock Exchange exactly corresponding with the contract notes rendered to him, the plaintiff, whereas in fact the defendants had not only charged their own commission, but added one-sixteenth to the price. Bigham J., before whom the case came, said the case was governed by *Stange* v. *Lowitz* (2) and that the defendants would have to pay something. The case was settled.

But that is not this case, where the plaintiff charged the defendant the same price as that at which he had been debited by the London stockbroker, and for which, in the first place, that broker looked to him for payment. He was not, therefore, either making a secret profit, nor was he selling as a principal. Nevertheless, the principle on which that case was decided is the same as that on which I am deciding this case, namely, that an agent cannot recover from his principal as on an indemnity unless he can prove that what he has done and for which he seeks indemnity was within the scope of his authority. The result is, therefore, this—that the defendant is entitled to repudiate the transactions which are the subject of this action, and there must be judgment in her favour, with costs, all costs incurred by the plaintiff in relation to the defence of gaming and wagering to be set off against the other costs.

Judgment accordingly.

Solicitors for plaintiff: *Law & Worssam, for Bickle & Wilcocks, Plymouth.*

Solicitor for defendant: *H. Dobell, for J. P. Dobell, Plymouth.*

(1) (1901) 17 Times L. R. 259. (2) 14 Times L. R. 468.

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

March 12, 13, 16, 27.

THE GRAMOPHONE AND TYPEWRITER, LIMITED *v.* STANLEY.

Revenue—Income Tax—Company resident in United Kingdom—Shares held in foreign Company—Control—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sched. D.*

An English company carrying on business in the United Kingdom was the holder of all the shares in a German company:—

Held, that that fact alone did not make the business of the German company the business of the English company so as to render the English company liable to income tax under Sched. D of 16 & 17 Vict. c. 34, upon the full amount of the profits made by the German company; and that the English company was only liable to pay income tax upon such profits of the German company as had been received in this country.

Decision of Walton J., [1906] 2 K. B. 856, affirmed.

APPEAL from a decision of Walton J. (1) on a case stated by the Commissioners of Inland Revenue, the point being whether the above-named English company was liable to income tax in respect of profits made by a German company in which the English company held all the shares.

The case stated by the Commissioners is set out in detail in the report of the case in the Court below, and the following summary is sufficient for the purposes of this report.

At a meeting of the Commissioners on January 22, 1903, the Gramophone and Typewriter, Limited, the appellants, appealed against an assessment under Sched. D of 16 & 17 Vict. c. 34 for the year ended April 5, 1902, amounting to 79,348*l.* The appellant company is an English company registered under the Companies Acts, 1862 to 1898, on December 10, 1900, having a registered office at 21, City Road, in the city of London (formerly at 31, Maiden Lane, Covent Garden, in the city of Westminster). The memorandum of association of the appellant company states that the objects for which the company is established are (inter alia) to acquire and take over, as a going concern, the business and undertaking carried on at 31, Maiden Lane, London, W.C.,

(1) [1906] 2 K. B. 856.

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and elsewhere, under the style or firm of "The Gramophone Company, Limited," and all or any of the assets and liabilities of the proprietors of such business and undertaking. The Deutsche Grammophon Aktiengesellschaft, herein referred to as the German company, was registered on January 30, 1900, and amongst those who united in forming it were the Gramophone Company, Limited, named in the memorandum of association of the appellant company. The German company was constituted on January 30, 1900, under a deed of association, a joint stock company with limited liability in conformity with the German law, with its head office in Berlin. Art. 213 of the German Code is as follows:—"Shareholders cannot demand back their money, they have only a right during the duration of the company to net profit, unless such distribution is prohibited either by the law or by the articles." The constitution, or administration as it is called, of the German company provides that "The official bodies of the company are (*a*) the general meeting of shareholders, (*b*) the board of supervision, (*c*) the board of management." The balance-sheet and distribution of profits is to be prepared and made in accordance with the following articles: "The business year comprises the period from September 1 to August 31 of the following year. The first business year extends from the day of the registration of the company to August 31, 1900. The board of management has to determine every year, with the sanction of the board of supervision, how much shall be written off annually from the book value of the immovable and movable property. With regard to the depreciation of the patents, at least one-third of the working profit remaining after deduction of all the business expenses shall, before anything is written off the immovable property, be devoted to writing off amounts on patents or similar accounts. The balance-sheet is to be made up to August 31. The net profit remaining after writing off all depreciation and setting aside all reserves and carrying forward any sum to new account shall be distributed as follows: (1.) In the first place the shareholders shall receive a dividend up to 4 per cent. on the paid-up share capital. (2.) The board of supervision shall then receive a percentage of 6 per cent. of the remainder. (3.) The rest shall be distributed as a

further dividend." The German company in making up its balance-sheet stated its total profits at 79,348*l.* 10*s.* 10*d.*, but of that amount 15,000*l.* was, in accordance with the requirements of German law, transferred to a depreciation fund. The appellant company now holds all the shares of the German company, and the members of the board of management of the German company are also directors of the appellant company, and the members of the board of supervision of the German company are nominees of the appellant company. The directors of the appellant company, in accordance with the requirements contained in the articles of association of the same company, presented their report to their shareholders for the year ended June 30, 1901. From that report a total credit balance appears of 79,348*l.* 10*s.* 10*d.*, which balance was appropriated in manner set forth in the report, and the whole of which balance was included in the assessment now appealed against. It was admitted on the hearing of the appeal that the whole of the sum of 79,348*l.* 10*s.* 10*d.* was liable to be taxed under Sched. D except as to 15,000*l.*, part thereof, a sum stated in the report to have been transferred "to patents account, Germany, in accordance with German law." This sum of 15,000*l.*, transferred to patents account to meet the requirements of the German law, concerns the appellant company in respect of their interest in the German company. In the report of the directors of the appellant company the whole of the profits of the German company are brought in in one sum, but the board of management of the German company have set aside and transferred to their patents account the sum of 15,000*l.*, which amount is equivalent to the deterioration during the year of the value of the patents purchased by the German company, since these patents at the time of the constitution of the German company had three years to run. This sum of 15,000*l.* is provided out of earnings of the German company. It was contended on behalf of the appellant company (1.) that the sum of 15,000*l.* transferred to the patents account in conformity with the German law by the German company is not chargeable with income tax; that the sum of 15,000*l.* was not profits of the appellant company, inasmuch as there was no resolution in general meeting of the German

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company for the distribution of this sum among the shareholders, and by German law this sum could not be so distributed; and that the sum of 15,000*l.* was not profits or gains at all within the meaning of the Income Tax Acts, either of the German company or the appellant company. The Commissioners held (1.) that the English company controlled the German company from England, and that the head and seat and directing power of the appellant company were at the appellants' registered office in London; (2.) that the entire business of the German company was carried on by and was the business and property of the appellant company, and that the profits of the German company were the profits of the appellant company, and that this sum of 15,000*l.* was profits of the appellant company within the meaning of the Income Tax Acts, and, further, that all the profits of the German company should be assessed without regard to the mode of application of such profits, and they confirmed the assessment.

Walton J., in a considered judgment, came to the conclusion that there was no evidence that these profits were the profits of the appellant company: that the mere fact that the English company held all the shares in the foreign company did not make the business of the foreign company the business of the English company; and he accordingly allowed the company's appeal.

From this decision the surveyor of taxes appealed. The appeal was heard on March 12, 13, and 16.

Sir W. S. Robson, *A.-G.*, and *William Finlay*, for the Crown. The Commissioners have found that the Gramophone Company carries on business wholly or partially in Germany, and that finding cannot be disturbed if there is any evidence to support it. This company holds all the shares in the German company, nominates the officers of the German company, and the English directors are also the German directors. If the head and seat of the German business are in fact in England, then the whole of the profits of the German business are brought into account in assessing the profits of the English business. Therefore the whole of the German profits are to be taken into account, however appropriated. The mere interposition of a

foreign body does not defeat the claims of the revenue if in point of fact the English company is carrying on the business: *Alianza Co., Ld.* v. *Bell* (1); *San Paulo (Brazilian) Ry. Co., Ld.* v. *Carter* (2); *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (3); *St. Louis Breweries* v. *Apthorpe* (4); *London Bank of Mexico and South America* v. *Apthorpe.* (5)

[FLETCHER MOULTON L.J. referred to *Colquhoun* v. *Brooks.* (6)]

That is distinguishable because there the English business and the foreign business were entirely distinct; it was not a case of an English company controlling the business of a foreign company by acquiring the whole of its shares, and it is distinguished by the Court of Appeal in *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (3), which is on all fours with the present case. In estimating profits for revenue purposes, no deduction is made for depreciation of capital, and it is immaterial how those profits are applied: *Mersey Docks and Harbour Board* v. *Lucas* (7); *Coltness Iron Co.* v. *Black.* (8) The English company are therefore liable to taxation in respect of the 15,000*l.*

Danckwerts, K.C., and *R. Vaughan Williams*, for the English company. The English law does not tax the person who carries on a business in respect of profits which do not belong to him except in certain specific cases included in ss. 40-45 of the Income Tax Act, 1842, of which this is not one. The point is, to whom does the foreign business belong and by whom is it being carried on? If the profits are the profits of the English company, the employment of a foreign company is immaterial, and it is immaterial whether the employer has all the shares or only sufficient to control the foreign company, and when once it is found that the profits are taxable, it is immaterial how they are to be applied, whether in the formation of a sinking fund or in any other way; but the question is, whose profits are these? The fact that the same people are on the boards of the two companies does not make the one company's business or the one company's profit the business or profit of the other.

(1) [1906] A. C. 18.
(2) [1896] A. C. 31.
(3) (1899) 4 Tax Cases, 41.
(4) (1898) 4 Tax Cases, 111.
(5) [1891] 2 Q. B. 378.
(6) (1889) 14 App. Cas. 493.
(7) (1881) 1 Tax Cases, 385.
(8) (1881) 6 App. Cas. 315.

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The two boards have independent functions and independent responsibilities, and they are regulated by different laws. By the law of Germany a German company cannot carry on the business of the company for the benefit of a third party without the consent of a general meeting, and in this case no such consent has been obtained. The holding by one company of the whole or a preponderating proportion of the shares in another company, does not constitute that other company the agent of the first: *Kodak, Ld.* v. *Clark*. (1) A shareholder has no interest in the property as such or the profits as such of the company; he has no inchoate or other right until the dividends have been declared: *Browne* v. *Collins* (2); and he has no right to complain of those who are managing the affairs of the company except through the company: *Orr* v. *Glasgow, &c., Ry. Co.* (3) Therefore in this case the business of the German company is not the business of the English company, and the English company is not entitled to the profits of the German company, except what it gets as a shareholder of that company, i.e., the divisible profits which come over here. In *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (4) the American company was a mere simulacrum. The American company held the property as trustee for the English company; the business was carried on by the English company with English servants and with English capital; and the American directors were delegates of the English directors. The decision in *Bartholomay Brewing Co. (of Rochester), Ld.* v. *Wyatt* (5) is in favour of the respondents.

[BUCKLEY L.J. referred to *Automatic Self-Cleansing Filter Syndicate Co., Ld.* v. *Cunninghame*. (6)]

No one can be taxed under Sched. D except for his own profits: here there are two separate entities; the English company is only a holder of shares in the German company, on which it receives dividends on which income tax is paid. The profits in question are therefore the profits of the German company and are not liable to income tax.

(1) [1902] 2 K. B. 450, 464-5; [1903] 1 K. B. 505.
(2) (1871) L. R. 12 Eq. 586, 594.
(3) (1860) 3 Macq. 799, 804.
(4) 4 Tax Cases, 41.
(5) [1893] 2 Q. B. 499.
(6) [1906] 2 Ch. 34.

Sir W. S. Robson, A.-G., in reply. This really is a question of fact more than of law, and the findings of the Commissioners in the case are findings of fact which cannot be interfered with, and on these findings the company are "stated out of Court."

Cur. adv. vult.

March 27. COZENS-HARDY M.R. This is an appeal from the judgment of Walton J., who held that the plaintiff company, whom I shall call the English company, are not liable to pay income tax in respect of 15,000*l.*, part of the profits of a German company, not distributed in the way of dividend or transmitted to England, but written off by the German company in Germany to meet the depreciation of patents. The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use the words found in one of the authorities, "stated the appellants out of Court." I may add that the arguments before Walton J. proceeded upon this footing.

The German company was established in Germany in 1900 in accordance with German law. It was undoubtedly a company with several shareholders, who brought in considerable capital. One of those shareholders was an English company whose undertaking was subsequently acquired by the present English company. At some date, which is not stated, the English company acquired all the shares of the German company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the

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company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become, for all taxing purposes, his business. Whether this consequence follows is in each case a matter of fact. In the present case I am unable to discover anything in addition to the holding of the shares which in any way supports this conclusion. The German company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English company. It has its board of management and its board of supervision as required by the German law. Its accounts are made out in accordance with German law. On the other hand the English company has its board of directors, some of whom are on the German board. It has a proper account and balance-sheet, in which its interest in the German company is described accurately as so many shares in the German company, and the gross profits of the German company are in no way brought into the profit and loss account of the English company. Against this the only thing to be said is that the chairman of the English company made a foolish speech in which he treated the gross profits of the German company as profits of the English company, but the dividend declared by the English company did not proceed upon this footing. In my opinion it would be wrong to attribute to the loose and inaccurate language of the chairman a force sufficient to override the formal acts of both the English company and the German company and all the other circumstances of the case. The Crown can, in my opinion, only succeed by making out that the German company was

merely the agent of the English company as principal in carrying on the business. Nothing short of this would suffice, and I can see nothing to justify such a conclusion. We have been greatly pressed by the case of *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (1) But when the facts of that case are looked into it is apparent that the Chicago company was a mere form, kept up to satisfy the American law, and that the three American directors accepted the position of delegates of the English company. The officers and servants of the American company were appointed and dismissed by the English company, and the working capital required for carrying on the business was provided by the English company. In other words, the relation of principal and agent did exist in that case. If an action was brought by a creditor of the German company against the English company as undisclosed principal, and the only materials before the jury were those found in the case stated by the Commissioners, I think it would be the duty of the judge to nonsuit the plaintiff. If it is said that the relation between the companies was that of trustee and cestui que trust rather than that of agent and principal, I think it is equally clear that no action could be maintained on that footing. In my opinion Walton J.'s decision was perfectly right. The English company is only liable to pay income tax upon such portions of the profits of the German company as have been received in this country. The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion.

Much of the law applicable to the question before us is not open to reasonable doubt. The holding of shares in a foreign corporation, entirely situated and carrying on business in a foreign country, comes unquestionably under r. 5. The English holder is liable only for such profits as he actually receives in this country by way of dividend, and is in nowise responsible for what the actual profits of the corporation itself have been, nor whether according to English law a larger amount might have been divided as dividend. The profits of the corporation are not profits of any business carried on by him in a foreign

(1) 4 Tax Cases, 41.

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country, because the individual corporator does not carry on the business of the corporation. He is only entitled to the profits of that business to a certain extent, fixed and ascertained in a certain way depending on the constitution of the corporation and his holding in it.

This legal proposition that the legal corporator cannot be held to be wholly or partly carrying on the business of the corporation is not weakened by the fact that the extent of his interest in it entitles him to exercise a greater or less amount of control over the manner in which that business is carried on. Such control is inseparable from his position as a corporator and is a wholly different thing both in fact and in law from carrying on the business himself. The directors and employees of the corporation are not his agents, and he has no power of giving directions to them which they must obey. It has been decided by this Court, in the case of *Automatic Self-Cleansing Filter Syndicate Co., Ld.* v. *Cunninghame* (1), that in an English company, by whose articles of association certain powers are placed in the hands of the directors, shareholders cannot interfere with the exercise of those powers by the directors, even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself.

Nor is this principle less true when the holding of the individual corporator is so large that he is able to override the wishes of the other corporators in matters relating to the control of the business of the company. The extent, but not the nature, of his power is changed by the magnitude of his holding. It is not open in this Court to dispute this proposition of law, inasmuch as in *Kodak, Ld.* v. *Clark* (2) this Court decided that it applied to a case where the holding of an English company in a foreign corporation amounted to 98 per cent. of the total capital of the corporation. But apart from this decision, which is binding upon us, I am of opinion that it is sound law. I can see nothing changed in the relationship of the individual

(1) [1906] 2 Ch. 34. (2) [1902] 2 K. B. 450; [1903] 1 K. B. 505.

corporator to the business of the corporation by the fact that he is a large holder of the stock.

The present case requires us to examine a more difficult question, namely, that of an individual corporator who owns the whole of the stock of the corporation. According to English law it is not possible for an individual corporator to be the legal owner of the whole of the stock of a company of this kind so as legally to be the sole shareholder, inasmuch as the company would by English law cease to exist if the number of corporators fell below a certain standard. But according to German law no such limitation appears to exist, and in the present case the respondents acquired the whole of the shares of the German Gramophone Company, without thereby terminating or interfering with its corporate existence or the legal incidents thereof and it is in consequence of such acquisition that the present dispute arises.

Treating it as an abstract proposition of law, I am of opinion that the acquisition of the whole of the shares of a corporation by one individual does not of itself alter the nature of his relationship to the corporation. His de facto control when he possesses 98 per cent. is probably complete from a practical point of view, and although it is no doubt rendered more complete in theory when he possesses himself of the whole of the shares, it is still of the nature of a control exercised by corporators over the corporation, and does not make him and the corporation in any sense identical. The directors of the corporation do not become his agents. Their duties are still controlled by the rules and constitution of the corporation itself. Nor is this consideration one of theoretical law only. The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that they will be so held at a future time, and the responsibility of the directors and officers of the corporation is to the corporation itself, whatever be its composition at any moment as to number of corporators. It will be no excuse to them when called to account in the regular way and at the regular periods, according to the constitution of the corporation, to plead that they obeyed the directions of the individual corporators as they existed at a

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particular moment (unless given in the manner prescribed by the constitution of the corporation), and on the strength of such directions failed to obey the corporate rules.

The German company was not in its inception a "one man" company. It was formed by the coalition of three firms or companies, of which one was a predecessor of the present English company. Its capital consisted of 1000 shares, of which 540 were held by the then existing English company and the other 460 were held independently. Although, therefore, from the first the English interest in the company was what is often called a "controlling interest," there was a substantial holding in the company in other hands, so that there can be no doubt that initially it was a bona fide German company in which the interest of the English company was only that of holding shares. From the time of its formation to the date with which we have to deal it has been carried on, so far as appears, in a strictly regular manner as a German company. It possesses German statutes, the requirements of which have been punctiliously complied with by the governing body of the company. The balance-sheets for each year are before us, and they shew that the management have put aside the sums which they were required to put aside for depreciation by German company law, and they have also put aside sums in respect of the depreciation of the patents which were in accordance with the provisions of the statutes of the company, though larger than the minimum prescribed thereby. Dividends have been regularly declared and the balance carried forward. It is further to be remarked that there is no trace of anything like the relationship of agency between the German company and the English company at any part of its existence. The proceedings at the general meetings are quite regular, and in some cases deal with the price at which goods are purchased by the German company from the English company. They regulate the salaries to be paid to the German Aufsichtsrath or board of supervision, and it is evident from the accounts that the German Vorstand or management was paid an amount based on the result of the trading. Indeed, there has been no suggestion from first to last that the German company has not been regularly carried on as

though it were an independent company (except perhaps as to one matter with which I shall presently deal), and it seems to me clear that at any time the English company, which now possesses the whole of the shares of the German company, might have sold any proportion of them to independent corporators, and the latter would have found the affairs of the German company in strict order, just as though it had been carried on throughout as a company in which the shares were held in many hands.

During the argument counsel for the Crown pressed upon us certain decisions with regard to companies formed in England to purchase breweries in the United States of America, and more especially the case of *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (1) and *United States Brewing Co., Ld.* v. *Apthorpe.* (2) These cases are very valuable as illustrating the principles to be applied in cases of businesses carried on in foreign countries in which English companies are interested, but there is a danger in regarding them as mainly turning upon abstract principles or laying down general rules. In almost all the cases special facts are to be found which greatly influenced the decisions of the Courts, and as they are confessedly cases that are near the border line, it is impossible to say that the ultimate decision of the Court was not arrived at by reason of these special facts. In both of the above cases I find that the English company was formed for the specific purpose (among other things) of purchasing the foreign undertaking, and that its purpose was carried out by a direct sale of the property, plant and business of that foreign undertaking to the English company. It is true that in both these cases, in order to evade the laws in force in the State as to the holding of certain types of property by foreign corporations, substantially the whole of the shares of the foreign company were simultaneously transferred to the English company for the purpose of keeping up the fiction that the American property still belonged to the American company. But it is evident from the facts stated in each of the special cases that the business was carried on by means of the plant and property of the English company and with working capital provided by it.

(1) 4 Tax Cases, 41. (2) 4 Tax Cases, 111.

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It was far more than merely the holder of the shares in the American company. In my opinion in each of these cases the persons who managed the American business after it had been transferred to the English company were in the position of agents of the English company and would have been accountable to it in that capacity. In my opinion no relation of this kind is shewn to exist in the present case. The English company has no relation to the German company, except as being the holder of its shares.

In order to bring the present case within these decisions, counsel for the Crown relied very strongly on the language of the finding of the Commissioners in the present case, and he contended that it must be looked upon as a finding of fact binding on all the Courts, and that, in other words, the Commissioners had "stated the appellants out of Court" by these findings. In my opinion the findings were not intended to have that effect, and it would have been very unfair of the Commissioners thus to have shut the appellants out from the right to take the opinion of a superior Court. The point of law which they desired to raise was whether there was any such evidence as would justify a jury in coming to the conclusions expressed in the Commissioners' findings, and an examination of the case convinces me that the Commissioners intended to put before the Court the whole of the evidence which they had before them, so that the Court might judge whether it justified those findings.

The only special circumstances on which counsel for the Crown relied, (beyond the fact that the English company was the holder of the whole of the shares of the German company,) are to be found in the speech delivered by the chairman of the English company at a general meeting of the shareholders and in a report to those shareholders which was put before them at that meeting. In my opinion it is impossible to look upon such statements as altering the legal position of the English company or creating any estoppel against it. The first set of references in the speech of the chairman reduces itself to an expression of opinion that the profits of the German company belonged to the English company and were available for distribution. The passage is unquestionably incorrect, because the whole

of one of the items mentioned and part of another could not have been used for distribution without violating the German law to which the German company was of course subject. But apart from this it is only the expression of a layman for whose views the company is not responsible, nor could the expression of those views on such an occasion give any rights to the Crown. The most important part of the second paragraph relied on reads as follows:—"Those two resident directors in Germany would be content with a nominal sum in future, for they had practically nothing to do, the whole of the shares of the German company being held by this company." On examining the passage it is clear that in using the word "directors" the speaker referred to members of the Aufsichtsrath or committee of supervision, and he is referring to the arrangement by which the German company had fixed 200*l.* as the total remuneration of the five members of the Aufsichtsrath, to be divided amongst them in such proportions as they agreed among themselves. To my mind this is no indication that the English company was anything more than the holder of the shares of the German company. It was natural that they should put on the German board of supervision men who were directors of the English company, and on the English board the German members of the board of supervision, and that the functions of the German board of supervision would be reduced to a minimum by the unity of holding. But I can see nothing in this to indicate that the German company was not carrying on a bona fide business under German management in all respects according to German company law, and that its property and capital in fact as well as in form belonged to such company.

The other piece of evidence relied upon by counsel for the Crown was the report of the directors to the company which was presented at the same meeting. This speaks of the profits of the German company and of the holding of 74 per cent. of the French company, and no doubt adds them to the credit balance of the trading of the English company in order to obtain the total credit balance. But it goes on to make substantially the same deductions that are made in the balance-sheet of the German company, so that the objection is in reality to the form of the

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statement, and not to its substance. There is nothing in this statement, moreover, which indicates any intention to interfere with the independence of the German company, and I think that both it and the speech of the chairman are wholly insufficient to distinguish this case from the simple case in which the whole of the shares of a foreign company carrying on an independent business are held by an English company. As I have said, this is insufficient in itself to make the business of the foreign company a part of the business of the English company. The shares remain, in my opinion, possessions in that foreign country and come under the fifth case. Duty, therefore, is payable on so much of the profits of the German company as are remitted to the English company by way of profits or dividend, and the sum of 15,000*l.*, which unquestionably was not so remitted, is not chargeable with duty. I am therefore of opinion that this appeal should be dismissed.

BUCKLEY L.J. I am of the same opinion and, after the judgments which have been given, need do no more than state shortly my reasons in my own words. The question is, I think, one of fact, and one upon which we are not concluded by any findings of fact on the part of the Commissioners. The question of fact is whether the business in Germany is carried on by the appellant company. If it is, the respondents do not dispute that the Attorney-General is right. If, on the contrary, the German business is not carried on by the English company, then equally the Attorney-General cannot dispute but that the English company is assessable only upon the dividends which it may receive upon its shares in the German company.

In order to succeed the Attorney-General must, I think, make out either, first, that the German company is a fiction, a sham, a simulacrum, and that in reality the English company, and not the German company, is carrying on the business; or, secondly, that the German company, if it is a real thing, is the agent of the English company. As regards the former of these, there are no facts at all to shew that the German company is a pretence. It was formed in January, 1900, by the union of three other companies, each of which brought in substantial properties, and

of two individuals. It is duly constituted and governed according to German law, and there is no ground whatever for saying that it is other than a real German corporation carrying on business in Germany under circumstances in which the company and its officers are amenable to German law and with a view to the acquisition of profit. The only remaining question, therefore, is whether the German company is agent of the English company, whether the English company is really carrying on the business and is employing the German company to do so on its behalf. Upon this point the Attorney-General relies principally upon the fact that, as stated in paragraph 17 of the case, the appellant company now holds all the shares of the German company. In my opinion this fact does not establish the relation of principal and agent between the English company and the German company. It is so familiar that it would be waste of time to dwell upon the difference between the corporation and the aggregate of all the corporators. But I may point out the following considerations as bearing upon the question whether the possession of all the shares is evidence of agency. Suppose that during the year whose accounts are under review the appellant company had held no shares at all in the first six months and had held all the shares in the last six months, or suppose that, having held all the shares but ten to-day, it became the holder of all to-morrow and again parted with ten the next day, it cannot seriously be suggested that each time one person becomes the holder of all the shares an agency comes into existence which dies again when he parts with some of them.

Further it is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This Court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co. Ld.* v. *Cunninghame* (1), that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are

(1) [1906] 2 Ch. 34.

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not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas.

The inquiry may be put in another form by asking who would be liable upon the contracts of the German company. Obviously the German company, and not those who are the holders of its shares.

Another test to be applied may be whether the English company has ever in fact interfered with and controlled the German company. The case contains no statement at all that they have ever done so. The German company is and must be the actor in carrying on the business, and none the less if the English company owns all the shares. The fact is that from (*a*) the control of the business, which no doubt is in the power of the corporators by taking proper steps for the purpose, to (*b*) carrying on the business is a long jump. The argument of the Attorney-General seeks to make the two things identical. Much reliance was placed in argument upon the form of the English company's report and accounts. To my mind nothing turns upon it. It would be illusory to found upon the statement in the report the conclusion which the Attorney-General desires, shutting one's eyes at the same time to the form of the balance-sheet. If the profits of the German company were profits earned in a business carried on in Germany by the English company, they ought to have been included in the balance-sheet and certified by the auditors at its foot. They were not so included, but were made

the subject of a footnote which separates them from the profits of the English company to which the auditors had spoken.

Holding this to be a question of fact, it is not useful, I think, to deal at any length with the cases. I content myself by using, for the purposes of illustration and contrast, the two cases of *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (1) and *Kodak, Ld.* v. *Clark.* (2) The point in *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (1) was that the English company bought all the shares but three, and (so far as was possible under those circumstances) all the property, plant, and business of the American company. The agreement between the two companies provided that the American company should be kept on foot, and that the American company were to do all things required for vesting the management of the American company in the English company. The English company raised and found the working capital, and the board of directors of the English company were to have the entire right of control and entire directing power over the affairs of the American company. It was upon these facts as analysed in the judgment of A. L. Smith L.J., and indicated by the other members of the Court, that they held that the English company was really carrying on the American business. Romer L.J. at the commencement of his judgment negatived the case as being one in which the English company merely occupied the position of owning all the shares. In *Kodak, Ld.* v. *Clark* (2), by way of contrast, the English company owned 98 per cent. of the shares. It is true that they did not own them all, but that was not the ground of the decision. The ground was that, while the English company as holding 98 per cent. of the shares no doubt had the control, they had it only as shareholders, and it was the corporation and not the shareholders who were carrying on the business.

To my mind nothing results from the fact that the two managers of the German company are directors of the English company. I have no doubt that the English company in a popular sense, by its ownership of the shares and by the person of those who conduct affairs in Germany, has an effective control

(1) 4 Tax Cases, 41. (2) [1902] 2 K. B. 450; [1903] 1 K. B. 505.

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over the German business. That to my mind is not the question. The question is whether the English company is carrying on the business of the German company. In my judgment it is not. Upon these grounds I think that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Broad & Co.; The Solicitor of Inland Revenue.*

W. C. D.

C. A. 1908 *March* 31.

[IN THE COURT OF APPEAL.]

ROSENQVIST *v.* BOWRING & CO., LIMITED.

Employer and Workman—Compensation—Rate of Remuneration—Seaman—Average weekly Earnings—Board and Lodging in addition to Cash Wages—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (2) (*a*).

On a claim for compensation under the Workmen's Compensation Act, 1906, by a seaman who received a weekly sum in cash and his board and lodging on the ship:—

Held, that having regard to the circumstances under which an ordinary seaman is necessarily engaged and paid, there is no other practicable test for computing the value to him of the board and lodging provided by the employer, than (in the absence of special circumstances) the actual cost of these allowances to the shipowner.

APPEAL against an award of compensation under the Workmen's Compensation Act, 1906, by the judge of the Whitechapel County Court.

The question for decision was the basis upon which the value to the workman of the board and lodging provided by the employer was to be calculated in assessing his "average weekly earnings" so as to arrive at the amount of compensation payable in the event of an accident. The facts were as follows: The applicant in the arbitration, who was also the appellant, was employed by the respondents as an ordinary seaman on board the steamship *Gasfra*. In August, 1907, while the ship was in dock at Marseilles, the appellant was engaged in removing coal from the lower hold, and in doing this his hand got caught between a rope and the winch, with the result that he was so seriously injured that amputation of the arm became necessary. Upon the appellant commencing proceedings under

the Workmen's Compensation Act, 1906, "permanent partial incapacity" and "temporary total incapacity" and liability to pay compensation were admitted, the only question raised being the basis on which this compensation was to be calculated. It appeared that the appellant received 21*s.* a week in cash and his board and lodging on the ship, and the main point was what was the value to the appellant of this board. There was evidence on behalf of the appellant that food and lodging on shore would cost him 16*s.* a week. Evidence for the respondents consisted of a deposition by the ship's steward that he bought the stores for the ship, and calculated that the cost of them to the owners worked out at 1*s.* 3*d.* per head for each ordinary seaman per diem, and the lodging at 4*d.* per diem. The county court judge accepted these figures and awarded compensation on the footing that the appellant's board and lodging were worth 1*s.* 7*d.* per diem, or 11*s.* 1*d.* a week, in addition to the cash payment of 21*s.* The applicant appealed.

B. Jacobs, for the appellant. The true test of the value of these allowances is, as was laid down in *Dothie* v. *Robert Macandrew & Co.* (1), what was the actual value to the workman of the board and lodging provided for him by the shipowners. The actual cost to the shipowners is not a fair test: the shipowners buy in large quantities at varying prices; they may even have special facilities for obtaining food abroad at a very low rate, which in no way represents the value of this allowance to the sailor; for instance, they may be carrying home frozen meat, some of which may be available for the food of the crew.

It is clear that the sailor could not have provided himself with board and lodging for 1*s.* 7*d.* a day, and, though the cost of living on shore may not be the true test, as being very much higher than living on board, still the allowance of 1*s.* 3*d.* a day for food and 4*d.* for lodging is much too low, and compensation ought to have been allowed upon a higher scale. The county court judge was wrong in giving no weight to the evidence on behalf of the appellant as to the cost of providing for himself.

A. Neilson, for the respondents, was not called upon.

(1) [1908] 1 K. B. 803.

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ROSENQVIST v. BOWRING & CO., LIMITED.

COZENS-HARDY M.R. I am much obliged to Mr. Jacobs for his very clear and able argument. But upon the whole he has not satisfied me that we ought to interfere with the award of the learned county court judge.

It must never be forgotten that the Workmen's Compensation Act does not attempt mathematical accuracy in matters of this kind. The keynote, I think, is to be found in Sched. I. (2) (*a*) to the Act of 1906, which runs: "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Certain special terms are added which may or may not apply to a particular case, but which certainly do not apply to the present case. We are therefore thrown back upon those words which I have read, and we must remember what was the nature of the occupation of the appellant; he was a sailor earning 21*s*. per week, and of course his food and lodging on board ship, and in the case of a person employed in an occupation like that I do not see what other test there can be than that which apparently has been adopted here. To guard myself against any misunderstanding, I should add that I do not mean to assert that as a general rule the cost to the employer is always or necessarily the value to the workman. I can conceive many cases in which the cost to the employer would be a wholly insufficient and inadequate test. I gave one in the course of the argument as an illustration, the case of a farmer who boards some of his workmen in the farmhouse; it may be perfectly true that in such a case the cost to the farmer of the board would be less than the cost which the workman would have to incur if he had to get his board outside the farmhouse. But the peculiarity of the present case is that there is no possibility of competition; the sailor engages to go on a ship which ex necessitate rei is victualled at the port from which the vessel starts. It is idle to consider for what the man could have purchased his salt pork, or whatever it might be, at the first port at which he stopped; still less is it possible to ask the quite absurd question what could he have got the salt pork for in the middle of the ocean, when of course there would be no possibility of getting anything of the kind. It seems to me that in an employment like this,

and in the circumstances under which a sailor is necessarily engaged, there is no other practicable or real test than to say that the value to the sailor is that which it has cost the shipowner. That, in fact, is the view which was taken by the learned judge. I do not see how he could have come to any other conclusion from the materials before him, for the only evidence which was adduced for the sailor was, what it cost the sailor to live while he was in port and on land—evidence which, even if it had some indirect bearing, was so remote that I think no real weight can now be attached to it.

On these grounds I think the learned county court judge was right in the view which he took, and that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and I agree with the reasons which have just been given.

This Act is intended to apply to all cases, and therefore to those in which it is impossible to get any perfectly correct measure of the amount of compensation that ought to be granted. The Act contemplates that such cases will arise, and says that you are to compute the weekly earnings "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." With regard to occupations on shore, I am very far from laying it down as a principle that the cost to the employer of that portion of the remuneration which is given in kind is necessarily to be taken as the measure of compensation in respect of such remuneration. But when you are dealing with the case of a seaman, where a portion of the remuneration is almost necessarily given in kind—in fact, as to lodging must necessarily be given in kind, and as to food must practically be so given—I agree with the Master of the Rolls in the conclusion that in the absence of very special circumstances the cost to the employer is the best measure that we can get of what is the remuneration that the sailor is receiving in that form. Certainly in the present case, where the only evidence before the judge was, on the one hand, the cost of board and lodging on shore, which could not, in my opinion, give a measure of the value of board and lodging on board the

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ship, and, on the other hand, the cost to the employer of the food and an allowance which seems to have been considered reasonable for the lodging, I think the learned judge had no alternative but to accept the latter. Therefore I think this appeal ought to fail.

BUCKLEY L.J. I remain of the opinion which I expressed in *Dothie's Case* (1), that what we have to find here, if we can, is the value of the allowance to the workman. It is not necessarily the cost to the employer; it is the value to the workman. The two may be the same, or, as we thought in *Dothie's Case* (1), the value to the workman may be at any rate not less than the cost to the employer. The question is whether the value to the workman is not here more than the cost to the employer.

That the test is not, as a general rule, the cost to the employer may be shewn in various ways. As was suggested in argument, the goods supplied may perhaps cost the employer little or nothing. The illustration was put by the Master of the Rolls of the farmer who employs farm servants upon a farm and supplements their wages by providing them with board in the farmhouse: the board, perhaps, costs the farmer but little. Another case may be put, that, say, of a draper's assistant, where the master offers the assistant the alternative of 6*d.* or his breakfast, and the man says, "I will take the breakfast, for to supply myself will cost me more than 6*d.*," whereas the cost to the employer of feeding a number of men will perhaps only be 6*d.* each. These are cases in which the cost to the employer may be less than the value to the workman. The point here is this: When a man is employed to serve on board ship, and is to have certain wages and to be provided with food and, of course, with a bunk to sleep in, if he had to supply himself, it would cost him, no doubt, more than it in fact costs his employer. But to apply that test is misleading, because the circumstances are such that practically he cannot supply himself, and the bargain is made upon the footing that, as he cannot supply, so he shall not supply himself, but his master shall provide supplies for him, and they are to be taken at their real value to him.

(1) [1908] 1 K. B. 803.

To my mind the amount which it costs the man to live on shore is for that purpose not wholly irrelevant, but I think it is very little guide indeed. It is relevant in this sense, that when the man accepts his employment no doubt he will say to himself, "As soon as I go on board ship I shall cease to have to pay so much per week for my maintenance on shore, and, therefore, it is worth my while to go for the wages that are offered." It is some factor, but it is a small factor.

I suggested during the argument, and I venture to repeat, what it seems to me is the theoretical but impracticable way of answering the question. The true measure is this: Supposing that the seaman were so constituted that he would never want to eat or drink anything and would not want sleeping accommodation, what higher wages would he require and get? The difference between that larger sum and the wages that he takes, is the value to him of the accommodation which is provided for him. Under the peculiar circumstances of the seaman's employment this, fantastic as it seems, does, I think, lead to a solution, because, as Fletcher Moulton L.J. pointed out, the owner of the ship under those circumstances would say, "Inasmuch as it would cost me 1*s.* 7*d.* per day to feed you and you are going without the food, what I am willing to offer you in addition is 1*s.* 7*d.*, and I do not offer you anything more than that," and therefore the man would not get the job unless he took it at the wages offered and the 1*s.* 7*d.* per day. That may be an answer; the cost to the employer under these peculiar circumstances may be the only matter which can be applied by way of measure of the value to the man. I am not sure myself that I should not have given this man something above the actual cost to the employer; but I have no reason to suppose that the judge proceeded upon any wrong principle, and if he did really endeavour to ascertain the value to the man and said, "Under these circumstances the value to the man is the cost to the employer," then I think that he was right.

Appeal dismissed.

Solicitors: *G. R. Thorne, Robinson & Co.; Holman, Birdwood & Co.*

W. C. D.

1908

March 24, 25.

TALBOT *v.* BLINDELL AND OTHERS.

Practice—Relief from Forfeiture — Conditional Order — Non-fulfilment of Conditions—Rules of the Supreme Court, Order XLII., *r.* 2.

Where an order granting relief against the forfeiture of a lease was expressed to be made upon the defendants performing certain conditions, and the defendants having performed part of the conditions declined to perform the remainder and desired to waive the relief:—

Held, that there was no power to compel the defendants to perform the conditions, and that the order for relief must therefore be treated as abandoned.

APPLICATION by the plaintiff "that a date be fixed for the carrying out by the defendants of the matters and things required to be done by them in accordance with the order of Walton J., dated November 25, 1907, the defendants having failed to carry out those matters and things, and that the defendants be ordered to proceed with the taxation of the costs as directed by that order, and, further, that in case of difference arising between the parties as to the terms of the form of the personal covenant for payment of machinery rent in that order directed to be entered into by the defendants, the covenant be settled by the associate or such other officer or person as the Court may direct, and that a date be fixed for the execution of the covenant, and that the defendants pay the costs of this application."

It appeared that in December, 1905, judgment was recovered by the plaintiff against the defendants in an action for possession of a colliery on the ground of breach of covenant. The colliery had been leased by the plaintiff to the predecessor of the defendants. Execution was not levied on this judgment, but after some negotiations and an appeal, which was subsequently abandoned by the defendants, they applied in December, 1906, to Walton J. for relief against the forfeiture. The application was adjourned from time to time, and finally, on November 25, 1907, Walton J. made the following order: "Upon hearing counsel on both sides on December 20, 1906, July 16 and 29, 1907, and November 16, 1907, and this day, it is ordered that upon the defendants . . . .

"1. Paying all rent in arrear, together with interest thereon from due date to date of payment at the rate of 5 per cent. per annum;

"2. Paying the costs of the action and appeal, including this application and the several adjournments thereof, as between solicitor and client, such costs to be taxed by the taxing Master, credit being given for costs already paid; and

"3. Entering forthwith into a personal covenant for payment of the machinery rent in terms similar to the lessee's covenant contained in the lease dated September 29, 1902, and made between the plaintiff of the one part and W. A. Blindell of the other part, the defendants have relief against forfeiture of the said lease. And it is ordered that it be referred to the taxing Master to tax such costs accordingly. Liberty to either party to apply on any question as to the form of the said covenant and generally. Liberty to apply."

On March 1, 1908, the defendants, who had already paid the rent in arrear in respect of the colliery up to Michaelmas, 1907, gave the plaintiff notice that they declined to carry out the other conditions of the order, and that they consequently waived the relief granted to them by it.

The present application was then made by the plaintiff.

J. E. Bankes, *K.C.*, and *R. Vaughan Williams*, for the plaintiff. The order having been drawn up, and the defendants having partly performed the conditions by paying the rent in arrear, they are bound to fulfil the other conditions and to take the relief that was granted by the order. The application for relief was made under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), and it was open to the defendants to refuse the relief and abandon their application at the time, but, the order having been drawn up, it is now binding upon them.

Under the general liberty to apply given by the order the Court can now amend the order so as to make it accord with the intention of the Court in granting the relief.

Upjohn, *K.C.* (*Ashton Cross* with him), for the defendants. The order is a conditional order, and the conditions are not mandatory at all. If the defendants decline to perform the

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conditions the order for relief falls to the ground. The defendants are no doubt tenants at will or on sufferance, and are bound to pay rent up to the time that they go out of possession. The payment of back rent, therefore, is not a part performance of the conditions of the order.

The order is a conditional order, such as was well known in the Court of Chancery, and it is governed by the provisions of Order XLII., r. 2, which says: "Where any person who has obtained any judgment or order upon condition does not perform or comply with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself, and any other person interested in the matter may on breach or non-performance of the condition take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a judge shall otherwise direct."

The plaintiff may therefore at once take out execution under the judgment for possession given in December, 1905.

Bankes, K.C., replied.

Cur. adv. vult.

March 25. WALTON J. In this action I gave judgment for the plaintiff in an action for possession in December, 1905. The action was brought by Miss Talbot, as lessor, against the representatives of the lessee of a coal mine, and I decided that she was entitled to re-enter upon the coal mine on the ground of forfeiture of the lease by breaches of covenant.

In December, 1906, the defendants applied to me to give them relief from their forfeiture. The application was from time to time adjourned, and finally, on November 25, 1907, I made the order, which was drawn up in this form. [The learned judge read the order.]

That order, therefore, directs that on the defendants doing three things they should have relief against the forfeiture of the lease.

That order was made in November, 1907, and I then understood that the defendants had made up their minds to take the relief on those conditions. They have partly performed those

conditions, as they have paid the rent in arrear up to last Michaelmas; but they have not paid the costs, although these have been taxed, and they have not yet entered into the personal covenant, and they now say that on more careful consideration they do not desire to have the relief which I then granted to them. Under those circumstances the plaintiff asks for an order practically directing the defendants to complete the performance of the conditions mentioned in the order, and, I suppose, to take the relief granted by the order.

I think that I must take the order as it now stands. I have no doubt that if I had been asked on November 25, 1907, to make it a condition of granting the relief that the defendants should there and then decide whether they would accept the relief on those terms or not, I should have acceded to that application, and should have made the order in the form that, "the defendants undertaking to perform the three things," the relief was granted. That, however, is not the form in which the order is made, nor do I think I can say that the order was drawn up in its present form by any slip or inadvertence. I do not think, therefore, that I can alter or amend the order, but I must deal with it as it stands. The result is, I think, that I must agree with the construction put on the order by the defendants. It is no doubt strange that all the proceedings since 1905 should thus be rendered abortive, and I feel that the result may well be seriously to affect the plaintiff's interest, since it is quite possible that it may be more difficult for her now to find a tenant for the coal mine than it would have been in 1905. Nevertheless I hold that I have no jurisdiction to compel the defendants to perform the conditions of this order or to take the relief which the order gives them on the performance of those conditions. The application is therefore refused, but under the circumstances the defendants must pay the costs of the application.

Application refused.

Solicitors for plaintiff: *Broad & Co.*
Solicitors for defendants: *Wrentmore & Sons.*

A. P. P. K.

1908
April 6.

ADDISON *v.* SHEPHERD.

Distress—Exempted Goods—Implements of Trade—Law of Distress Amendment Act, 1888 (51 *&* 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 147.

A commercial traveller, who was employed to sell typewriting machines on commission, was entrusted by his employers with one of their machines as a sample. While in his possession the machine was distrained by his landlord for rent due by him :—

Held, that it was not an implement of his trade and was not protected as such from distress by virtue of s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888.

Case stated by a metropolitan police magistrate.

The appellant, C. E. Addison, preferred a complaint against the respondent that he on October 14, 1907, being the agent of the appellant's landlord, unlawfully caused an Oliver typewriter which was by law exempt from distress to be seized and distrained for rent.

At the hearing the following facts were proved or admitted. At the date of the seizure complained of the appellant was the tenant of a certain house known as Vine Cottage at a weekly rent of 10*s.*, and the sum of 2*l.* was due and owing by him for arrears of rent. The appellant was a traveller and salesman in the employ of the Oliver Typewriter Company, Limited, a company carrying on business as sellers of certain typewriters known as Oliver typewriters. It was the duty of the appellant as such traveller and salesman to solicit orders on behalf of his employers for their typewriters, and for this purpose the company entrusted him with one of their typewriters in order that he might take it with him on his rounds and shew it to intending purchasers and demonstrate its use to them.

On October 14, 1907, the respondent, acting on behalf of the landlord of Vine Cottage, directed a certified bailiff to levy a distress for the said arrears of rent, and on the said date the bailiff seized and distrained the said Oliver typewriter which had been entrusted by the company to the appellant as aforesaid and was then at Vine Cottage. The bailiff, having seized the

typewriter, on November 6 caused the same to be sold for the sum of 7*l*. The value of the typewriter was 22*l*. It was contended by the appellant that the typewriter was a tool or implement of his trade within the meaning of s. 147 of the County Courts Act, 1888 (1), and was therefore, by virtue of s. 4 of the Law of Distress Amendment Act, 1888 (2), exempt from distress. The magistrate overruled the contention and dismissed the complaint subject to a case for the opinion of the Court.

Hon. M. Macnaghten, for the appellant. The typewriter was a tool or implement of the appellant's trade. In the first place, the appellant's calling as commercial traveller was a "trade" within the meaning of the statute. To constitute a trade the exercise of the person's calling need not involve manual labour. The old authorities shew that a scholar's books were conditionally privileged from distress as being the implements of his trade. Then, if the appellant's business was a trade, the typewriter was an "implement" of that trade. For without the specimen typewriter to exhibit to the persons from whom orders were solicited he would have but little chance of getting any orders. A tool or implement does not necessarily mean something by means of which a product is manufactured. In *Lavell* v. *Richings* (3) a cab was held to be privileged as being an implement of the cab-driver's trade, although it was in no sense an instrument of production. It is conceded that if the appellant is right samples of all kinds would be implements of a traveller's trade. But so they are. They are the physical instruments

(1) By s. 147 of the County Courts Act, 1888: "Every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting . . . . the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected from such seizure) . . . ."

(2) By s. 4 of the Law of Distress Amendment Act, 1888: "From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent; namely any goods or chattels of the tenant or his family which would be protected from seizure in execution under section ninety-six of the County Courts Act, 1846, or any enactment amending or substituted for the same."

(3) [1906] 1 K. B. 480

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without which he cannot successfully exercise his calling. Samples are not like stock-in-trade ; they are not intended to be sold themselves, but to be the means by which other things may be sold.

C. A. Black, for the respondent. It was not necessary for the procuring of orders that the traveller should take round the typewriter with him. A picture of the machine would suffice. It is a straining of language to say that samples are implements.

LORD ALVERSTONE C.J. On the whole, though not without some doubt, I have come to the conclusion that the magistrate in this case was right. What we have to decide is whether a typewriter taken on his rounds by a commercial traveller as a sample of the goods which he is employed to sell comes within the words "the tools and implements of his trade." In my opinion it does not. I have much doubt whether the trade of a commercial traveller is one which involves the use of any tools or implements at all. In *Lavell* v. *Richings* (1) the cab was a thing which was absolutely necessary to enable the cab-driver to earn his living as a cab-driver. Here the typewriter no doubt assists the traveller in earning his living, but it is not essential. He could earn his living as a traveller in typewriters without having a sample with him.

RIDLEY J. I agree. If this typewriter was an implement of the traveller's trade we should have to hold that samples of all kinds came within that description, and that, I think, would be a straining of language.

DARLING J. I am of the same opinion. But for the fact that a typewriter happens to be a thing which may be styled an implement it would never have occurred to anybody to suggest that it was an implement of this commercial traveller's trade. It is nothing but a sample, although, no doubt, it is a sample of an implement. In my opinion the Act meant that a person who works in a trade should have the things he worked with

(1) [1906] 1 K. B. 480.

protected, not the things he parted with. It has not protected samples.

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Appeal dismissed.

Solicitor for appellant: *A. W. Mills.*
Solicitors for respondent: *Walton & Co.*

J F. C.

THE KING *v.* SELFE.

1908

Feb. 10, 11; *April* 14.

County Court—Practice—Execution—Equitable Interest in Land—Appointment of Receiver—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 89.

Under s. 89 of the Judicature Act, 1873, a county court has power to appoint a receiver by way of execution against equitable interests in land.

RULE for a mandamus to the judge of the Brompton County Court to hear an application for the appointment of a receiver.

On March 11, 1907, judgment was recovered by the plaintiff in an action of *Weatherley* v. *Hayward* in the Brompton County Court for a sum of 10*l.* 6*s.* 6*d.* and costs. The defendant had no property which could be taken in execution, but he was entitled to an equity of redemption in certain freehold premises which had been mortgaged to third persons. By reason of the legal estate in the premises being vested in the mortgagees, the bailiff could not cause the defendant's interest in them to be delivered in execution under a writ of elegit. On June 21, 1907, application was made on behalf of the plaintiff to the county court judge for an order for the appointment of the plaintiff as receiver of the rents and profits of the defendant's equity of redemption in the said premises. The judge declined to entertain the application on the ground that he had no jurisdiction to make the order. The plaintiff obtained a rule for a mandamus to the judge to hear the application.

Rowlatt, on behalf of the county court judge, shewed cause. A county court has no jurisdiction to appoint a receiver by way

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of execution against equitable interests in land. By s. 146 of the County Courts Act, 1888, where a judgment is obtained in the county court the amount of the judgment may be recovered by execution against the goods and chattels of the party against whom the judgment is given, but by execution against his goods and chattels alone. That Court has no power to issue a warrant in the nature of a writ of elegit for the purpose of levying execution of the judgment against land. Where indeed the amount of the judgment exceeds 20*l.*, and the defendant is possessed of land, but no goods, the judgment may be removed under s. 151 of the County Courts Act into the High Court, in which event the defendant's land may be taken under an elegit. But where the amount of the judgment in the county court is below 20*l.*, which was the case here, there is no power to get execution against the defendant's land at all. It will be said that s. 89 of the Judicature Act, 1873, gives the county court power to appoint a receiver where the defendant's interest in land is equitable. That section provides that "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity . . . . shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies . . . . as might and ought to be done in the like case by the High Court." But the object of that section was to place the county court in the same position as the High Court as regards the power to give in every case both legal and equitable relief so far as applicable; it was "to clothe the inferior Courts . . . . with the same power of doing effectual justice by their judgments and orders as the High Court": per Bowen L.J., *Pryor* v. *City Offices Co.* (1) But it was no part of its object to give the inferior Courts any other or larger power than that possessed by the High Court. Now before the Judicature Act, where judgment was obtained in the Queen's Bench against a defendant possessed of land of which the legal estate was outstanding in a mortgagee, the plaintiff, if desirous of getting equitable execution against the defendant's equity of redemption, had first to issue an elegit and

(1) (1883) 10 Q. B. D. 504, at p. 509.

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then to commence a bill in equity asking for the appointment of a receiver. But since the Judicature Act it is no longer necessary to sue out an elegit as a preliminary to asking for a receiver, the issuing of an elegit in the case of an equitable interest being a useless and absurd form now that the Courts of Law and Equity are amalgamated: per Jessel M.R., *Anglo-Italian Bank* v. *Davies* (1); *Ex parte Evans, In re Watkins.* (2) If then the county court had power to issue execution against the legal interest in land, the effect of s. 89 would be to give it power to appoint a receiver of a defendant's equitable interest in land without requiring a fresh action to be brought for that purpose. But the county court has no such power, and as the appointment of a receiver is only ancillary to legal execution, it follows that that Court can have no power to issue equitable execution against land. To hold that it has such a power would be to give it a power which is not possessed by the High Court, namely, that of appointing a receiver in a case in which it has no power of granting legal execution.

McCardie, for the prosecutor. The only reason why the county court before the Judicature Act could not appoint a receiver was that the party asking for a receiver could not in that court comply with the preliminary condition as to suing out an elegit. But now that that condition has been abolished the objection no longer exists. Sect. 89 of the Judicature Act must be read in connection with s. 25, sub-s. 8, which expressly deals with the appointment of a receiver. "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The appointment of a receiver is a form of "relief" within s. 89. "It is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution": per Bowen L.J., *In re Shephard.* (3) The Judicature Act "has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously": per Lindley M.R., *Cummins* v. *Perkins.* (4) And in *Anglo-Italian*

(1) (1878) 9 Ch. D. 275, at p. 285.
(2) (1879) 13 Ch. D. 252.
(3) (1889) 43 Ch. D. 131, at p. 137.
(4) [1899] 1 Ch. 16, at p. 20.

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Bank v. *Davies* (1) Cotton L.J., speaking of s. 25, sub-s. 8, said: "Under that sub-section the Court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law." This disposes of the supposed absurdity of a plaintiff being able to get relief against the defendant's land where his interest is only equitable, but being unable to get it where the defendant also owns the legal interest.

Cur. adv. vult.

April 14. The judgment of the Court (Lord Alverstone C.J., A. T. Lawrence and Sutton JJ.) was read by

SUTTON J. The rule in this case raises the question whether a county court judge has power to appoint a receiver for the purpose of execution where the defendant has an equity of redemption in freehold premises, the legal estate being vested in mortgagees. The question depends upon the construction of s. 89 of the Judicature Act, 1873. That section directs the judge of a county court, as regards all causes of action within the jurisdiction of the Court, to grant in any proceeding before him the same relief, redress, or remedy, or combination of remedies, as if the proceeding were in the High Court itself.

Mr. Rowlatt, in shewing cause against the rule, contended, first, that inasmuch as county courts have no power to issue writs of elegit they cannot take the preliminary step without which under the old practice a receiver could not be appointed, and that, therefore, the judge of the county court has no power to appoint a receiver in respect of equitable interests in land.

Mr. McCardie on the other hand contended that the issue of a writ of elegit was a mere form, and the power to issue one was not essential to the jurisdiction to appoint a receiver of an equitable interest in land.

This contention depends upon the construction of s. 1 of 27 & 28 Vict. c. 112. That section enacts that "No judgment . . . . shall affect any land . . . . until such land shall have

(1) 9 Ch. D. 275, at p. 293.

been actually delivered in execution by virtue of a writ of elegit or other lawful authority." By s. 2 "land" in s. 1 includes equitable interests in land. Upon the construction of these sections it was held in the cases of *Anglo-Italian Bank* v. *Davies* (1) and *Ex parte Evans* (2) that since the Judicature Act, 1873, it is no longer necessary for a judgment creditor who seeks to obtain equitable execution to sue out a writ of elegit, but that the appointment of a receiver in respect of equitable interests in land constitutes an actual delivery in execution "by virtue of other lawful authority" within the meaning of s. 1, and that such appointment is equivalent to execution under a writ of elegit in respect of legal interests.

Mr. Rowlatt further contended that s. 151 of the County Courts Act, 1888, shews that it was not intended that county courts should have the power of appointing receivers in respect of equitable interests in land. As regards this contention, the section is a reproduction of s. 49 of the County Courts Amendment Act, 1856 (19 & 20 Vict. c. 108). Jurisdiction in equity was not conferred upon county courts by this Act, nor until the Act of 1865 (28 & 29 Vict. c. 99), ss. 1, 2. In 1856 the section, therefore, was necessary both for the purpose of providing for legal interests in land where the issue of a writ of elegit was required and also for equitable interests in land where the appointment of a receiver by way of equitable execution was necessary. It seems to us, therefore, that the object of the Legislature in reproducing this section in the Act of 1888 was to provide for legal interests in land in cases where the issuing of a writ of elegit might be necessary. In our opinion the construction of s. 89 of the Judicature Act, 1873, is not affected by either of these contentions. With respect to s. 89, the words "in any proceeding" were held by the Court of Appeal in *Pryor* v. *City Offices Co.* (3) to mean in any action, and as regards the words "relief or remedy" it was held by the Court of Appeal in *Shephard's Case* (4) that the appointment of a receiver by way of equitable execution is more properly called equitable relief, which is granted on the ground that there is no remedy by execution

(1) 9 Ch. D. 275.
(2) 13 Ch. D. 252.
(3) 10 Q. B. D. 504.
(4) 43 Ch. D. 131.

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at law. We think, therefore, that the rule should be made absolute.

Rule absolute.

Solicitors for prosecutor: *Weatherley & Co.*

Solicitor for county court judge: *Solicitor to the Treasury.*

J. F. C.

C. A.

1908

April 6.

[IN THE COURT OF APPEAL.]

ZICK *v.* LONDON UNITED TRAMWAYS, LIMITED.

Lands Clauses Acts—Notice to Treat—Creation of new Interest—Agreement for Tenancy — Surrender—New Agreement—Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 18.

By an agreement dated March 15, 1905, one F., as agent for the mortgagees in possession of certain premises, let the premises to one S. for three years from March 14, 1905. On May 15, 1905, notice to treat under the Lands Clauses Consolidation Act, 1845, in respect of the premises, was served by the defendants, a tramway company, on the lessors. By an agreement dated January 23, 1906, S. agreed to stand possessed of the lease of the premises in trust for the plaintiff, and in February the plaintiff entered upon the premises. Subsequently S. informed F., the lessors' agent, that he wished to transfer his interest to the plaintiff, and it was arranged between S., the plaintiff, and F. that the old tenancy should be surrendered, and a new tenancy should be granted to the plaintiff for a term of three years, being about a year longer than the residue of the former term. Accordingly, on February 14, 1906, an agreement was entered into by which F., as the lessors' agent, let the premises to the plaintiff for three years from that date:—

Held, that either the plaintiff or S. as trustee for him was entitled to compensation in respect of the tenancy under the original agreement of March 15, 1905, which still subsisted, in the absence of a valid surrender of it.

APPEAL from the judgment of Jelf J. in an action tried by him without a jury. (1)

The action was in form an action for trespass brought by the plaintiff Zick, who was the occupier of a shop, house, and forecourt, numbered 84, Merton High Street, Wimbledon, and carried on business there as a furniture dealer, to recover damages from

(1) [1908] 1 K. B. 611.

the defendant company for entering and trespassing upon the plaintiff's premises on March 20, 1907, and the following days, and for depriving him of the use of the said forecourt and thereby interfering with his business.

On the pleadings the defendants, besides putting the plaintiff to the proof of his case, set up the following defence: That by the London United Tramways Act, 1902 (2 Edw. 7, c. ccxlvii.), incorporating the Lands Clauses Consolidation Act, 1845, they were authorized to acquire compulsorily the said forecourt for widening the roadway; that on May 28, 1905, they served notice to treat on Coope and Heatley, the leaseholders, being mortgagees in possession of the said premises and forecourt, for the purchase of their interest in the said forecourt; that at the date of the service of such notice the plaintiff was not the occupier nor in possession of the said premises or forecourt, and had no interest therein; that, notwithstanding the service of the said notice, Coope and Heatley purported after the date of such service to grant to the plaintiff an interest in the said premises and forecourt by means of an agreement of tenancy, and that such an agreement of tenancy was invalid in law against the defendants; that after the service of the said notice, and before the alleged trespass, the defendants, having obtained the consent of all the parties interested in the said premises and forecourt, and having complied with the Lands Clauses Consolidation Act, 1845, requested the plaintiff to remove his goods from the said forecourt, and, on his refusal, entered thereupon under their statutory powers, and not otherwise; and that this was the trespass complained of. In the alternative, while denying liability, they paid 40*s.* into Court.

The plaintiff in his reply joined issue, and further pleaded that at the date of the service of the notice to treat one Sinclair was tenant in possession of the said premises under an agreement in writing dated March 15, 1905, for a term of three years from March 14, 1905; that in February, 1906, Sinclair transferred his interest to the plaintiff; that no notice to treat was at any time served by the defendants upon Sinclair or the plaintiff, nor had either of them at the date of the said transfer, or at the date of the agreement hereinafter mentioned, any knowledge or

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notice of the service of the notice to treat; that on February 14, 1906, the plaintiff surrendered the aforesaid agreement to the lessors of the said premises, and in lieu thereof accepted an agreement of tenancy of the said premises for a term of three years from February 14, 1906; and he contended that he was entitled to stand in the same position as if he still occupied under the original agreement of tenancy, namely, for three years, from March 14, 1905.

The pleadings were completed in June, 1907; but by correspondence in November, 1907, the parties agreed, in order to save expense and delay, that this action should be tried by a judge without a jury; that the sole question at the hearing should be whether the plaintiff was a person entitled to be compensated by the company under the Lands Clauses Consolidation Act, 1845, in respect of the acquisition by the company of the said forecourt; and that, in the event of the judge deciding the above question (subject to appeal) in the plaintiff's favour, he should recover nominal damages, namely, 40*s*., with costs on the High Court scale, and that the defendants should take the necessary steps to have a jury summoned under the Act to assess the compensation payable.

The following facts were proved or admitted:—

By agreement dated March 15, 1905, one Fellowes, as solicitor and agent for the mortgagees in possession, agreed to let to Sinclair, and Sinclair agreed to take, the premises in question for three years from March 14, 1905, at the yearly rent of 30*l*., payable monthly, and he carried on there the business of a furniture dealer.

On May 15, 1905, the defendants served on Fellowes a notice to treat for the purchase of the premises in question, addressed to Fellowes and all other persons having or claiming any estate or interest in the lands and hereditaments.

By an agreement dated January 23, 1906, Sinclair sold to the plaintiff Zick the furniture and effects in the shop and premises, with certain exceptions, for 50*l*., and agreed to stand possessed of the lease of the premises in trust for Zick, his executors, administrators, and assigns; and in February, 1906, Zick entered, and Sinclair became his manager.

Sinclair, in order to give Zick not only the beneficial, but the real, possession of the premises, then informed the agent of his landlords, Fellowes, that he desired to transfer to Zick the unexpired portion of his tenancy, and Fellowes said he thought he could arrange with his principals for the surrender of the existing tenancy and the granting of a fresh agreement to Zick for a term of three years, instead of Zick only taking a transfer of a term which had only two years to run, and, as this proposal appeared to be favourable to Zick, he accepted it, neither Sinclair nor Zick having any notice or knowledge of any notice to treat.

Accordingly, by an agreement dated February, 14, 1906, Fellowes, as solicitor and agent for the mortgagees in possession, agreed to let to Zick, and Zick agreed to take, the premises in question for three years from February 14, 1906. This new tenancy would not expire till February 14, 1909, but the original tenancy, if it had been transferred to Zick, would have expired on March 14, 1908.

In this state of things the defendants, without any notice to the plaintiff Zick or to Sinclair, entered upon the plaintiff's premises on March 20, 1907, and the following days up to March 26, 1907, took up part of the pavement of the said forecourt, and otherwise deprived the plaintiff of the use of the said forecourt, and this was the trespass complained of.

The learned judge gave judgment for the plaintiff.

Roskill, K.C., and *Lynden L. Macassey*, for the defendants. It has been decided that owners of land cannot create fresh interests in land in respect of which notice to treat has been given, so as to increase the burden on the railway or other company which has given the notice, subsequently to the date of the notice to treat: *Mercer* v. *Liverpool, St. Helens and South Lancashire Ry. Co.* (1) Therefore the agreement of February 14, 1906, is invalid as against the defendants, and the defendants are not bound to compensate the plaintiff in respect of the tenancy which that agreement purported to create, and which exceeded the period of Sinclair's tenancy under the agreement of March 15, 1905. The tenancy under the last-mentioned agreement was surrendered

(1) [1903] 1 K. B. 652.

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on the grant of the new tenancy to the plaintiff. The learned judge has held in effect that the plaintiff can be compensated in respect of so much of the new term as is co-extensive with the term of Sinclair's former tenancy. But the plaintiff's term cannot be apportioned in this manner. Upon payment of compensation the defendants are entitled to a conveyance of his interest; but what has he to assign? Sinclair's term is surrendered by the arrangement under which the new agreement was entered into, which, though void as against the defendants, is not therefore void against the lessors. If Sinclair's tenancy must be considered as still subsisting, he, and not the plaintiff, is the person entitled to any compensation in respect of it; and he is not a party to the action. [They also cited *Fenner* v. *Blake* (1); *Dawson* v. *Great Northern and City Ry. Co.* (2)]

H. Dobb, for the plaintiff, was not called upon to argue, but stated that the plaintiff offered at the trial to join Sinclair as plaintiff, if necessary, he being willing to be joined.

SIR GORELL BARNES, PRESIDENT. I am of opinion that the conclusion arrived at by the learned judge is right, and I can put my view of the case very shortly. An agreement was made on March 15, 1905, by which Fellowes, as agent for the mortgagees in possession of the premises in question, let them to one Sinclair for a term of three years, which would expire on March 14, 1908. On May 15, 1905, the defendants served the notice to treat on the lessors' agent. By an agreement dated January 23, 1906, Sinclair, without any knowledge of the notice to treat, sold to the plaintiff Zick the furniture and effects on the premises, with certain exceptions, and agreed to stand possessed of the lease of the premises in trust for the plaintiff; and in February the plaintiff entered on the premises. Afterwards, in order that the plaintiff should have not only the beneficial but also the legal possession of the premises, Sinclair informed Fellowes that he desired to transfer to the plaintiff the unexpired portion of his tenancy, and Fellowes said that he thought he could arrange with his principals for a surrender of the existing tenancy and the granting of a fresh

(1) [1900] 1 Q. B. 426. (2) [1905] 1 K. B. 260.

agreement to the plaintiff for a term of three years, instead of the plaintiff taking a transfer of a term which had only two years to run. The plaintiff accepted this proposal, and accordingly, on February 14, 1906, an agreement was executed for a new tenancy which would expire on February 14, 1909. Under these circumstances the defendants contend that the plaintiff is not entitled to any compensation. The objection taken by the defendants to the plaintiff's right to compensation appears to me to be purely technical and to have no merits. The parties to the transaction, Sinclair, the plaintiff, and Fellowes, entered into the agreement of February 14, 1906, for a new tenancy extending beyond the unexpired period of the former tenancy, thinking, no doubt, that it would operate as a surrender of the old term. But, in consequence of the service of the notice to treat, the mortgagees in possession of the premises had no longer any right to create a new tenancy which extended beyond the period of the existing tenancy. The result, as it appears to me, would be that the surrender never came into operation because the consideration for it failed. So Sinclair remained entitled to treat the original tenancy as subsisting, and to claim compensation in respect of it as trustee for the plaintiff. The plaintiff appears to have offered to join Sinclair as plaintiff in the action, but it does not seem to have been considered necessary, inasmuch as it was agreed that the real question for decision at the trial was whether the plaintiff, under the circumstances which I have mentioned, was a person who had such an interest as entitled him to compensation in respect of the period extending up to the date on which the original tenancy of Sinclair would have expired. For the reasons which I have given I think that the decision of the learned judge was in substance correct. If it be necessary to add Sinclair as a plaintiff, in order to get over any technical difficulty, I think that should be done.

FARWELL L.J. This is in form an action of trespass, but it is agreed that the only question really involved is whether the plaintiff Zick is entitled to compensation. In March, 1905, an agreement was made under which Sinclair became tenant of the

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Farwell L.J.

premises in question for a term of three years from March 14 at a yearly rent of 30*l*. In May of the same year notice to treat in respect of the premises was served on the lessors' agent. After service of that notice the lessors could create no new interest in the premises so as to throw any fresh burden on the defendants. In ignorance of the notice to treat Sinclair sold to the plaintiff his interest in the premises. Upon his informing the lessors' agent that he wished to transfer his interest, he and the plaintiff and the lessors' agent came to the conclusion that the better arrangement would be that the old tenancy should be surrendered and a new one created for a longer term, which was accordingly done by the agreement dated February 14, 1906. That agreement the defendants were entitled to treat as void, and they did so treat it. The law is laid down by Coleridge J. in *Doe* v. *Courtenay* (1) "that, where the new lease does not pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that, in case of an express surrender, so expressed as to shew the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void." If the learned judge in the Court below has not expressed himself quite in the same terms, I think, by what he said on p. 616 of the report in the *Law Reports*, he meant the same thing. I do not think that he meant to say that the agreement for the new tenancy might be remodelled, so as to make the term co-extensive with the remainder of the term under the original tenancy, but that he acted on the well-established rule that, where a new lease is granted on the footing that an old lease is surrendered, upon the avoidance of the new lease the surrender is void, the consideration for it having failed. I agree that this appeal should be dismissed.

(1) (1848) 11 Q. B 688, at p. 712.

KENNEDY L.J. I am of the same opinion. There may be some expressions in the judgment of Jelf J. with which I should not entirely concur, but in substance I think it is correct, on the ground that, if the grant of the new lease is void, the surrender supposed to be worked by the acceptance of it is gone, and the tenancy of Sinclair remains in existence, of which tenancy the plaintiff is the beneficial owner. It may be a question whether technically Sinclair ought to be added as a plaintiff. But it seems to me impossible that the law in such a case can be that not only is the new tenancy void, but no tenancy at all is left in existence. Clearly, I should say, the legal position is that the lessors would only have a right to be paid compensation subject to the right of the tenant to compensation in respect of the residue of Sinclair's lease, the beneficial interest in which belonged to the plaintiff; and whether Sinclair is joined in the action or not is merely a question of form, the plaintiff being the person really entitled.

Appeal dismissed.

Solicitor for plaintiff: *A. E. Cubison.*

Solicitors for defendants: *Stanley, Wasbrough, Doggett & Baker.*

E. L.

1908
Feb. 14.

DAVIS (on Behalf of the Mayor, Aldermen, and Councillors of the Metropolitan Borough of Islington) *v.* WALLIS.

Rating—Rateability of Owner—Parliamentary Borough—Abatement or Deduction—Tenement wholly let out in Apartments or Lodgings—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.

The respondent was the owner of a tenement situate in a borough which in the year 1867 was, and ever since had been, a parliamentary borough. The tenement was wholly let out in apartments or lodgings not separately rated within the meaning of s. 7 of the Representation of the People Act, 1867. Purporting to act under that section, the rating authority rated the respondent as owner, instead of the occupiers of the tenement, without allowing him any commission, abatement, or deduction:—

Held, that the Act under which the respondent was rateable as owner instead of the occupiers was not the Representation of the People Act, 1867, but was the Poor Rate Assessment and Collection Act, 1869, and that he was entitled to the commission, abatement, or deduction specified in s. 3 or s. 4 of the later Act.

Case stated by a justice of the peace for the county of London.

On May 30, 1907, the appellant, a rate collector appointed by the council of the metropolitan borough of Islington, made a complaint to one of the justices of the peace for the county of London that the respondent, being the person duly rated and assessed in and by the general rate of the said borough, made, dated and sealed on March 30, 1907, in six several sums, amounting in the whole to 11*l.* 7*s.* 2*d.*, in respect of six several houses in Sun Row, in the said borough, and numbered 3 to 8 inclusive, had refused or neglected to pay the said several sums, and that the appellant had duly demanded the payment of such rates and assessments, and thereupon, in pursuance of the London Government Act, 1899 (62 & 63 Vict. c. 14), and of the London (Financial Arrangements) Scheme, 1900, the Borough of Islington Order in Council, 1900, and the Borough of Islington Scheme, 1901, made pursuant thereto, the said justice of the peace signed and issued six several summonses addressed to the respondent commanding him to attend on June 7 before him, or

such other justice or justices of the peace for the said county as might then be there, to answer to the said complaint and to be further dealt with according to law.

In pursuance of the said summonses the respondent appeared before the justice of the peace stating the case on June 7, and by adjournment on June 28, 1907, to answer the said several summonses, and on June 28 the said justice of the peace refused to issue warrants of distress against the goods and chattels of the respondent in respect of the said sums, and dismissed the said summonses.

The appellant, being dissatisfied by the determination of the said justice of the peace on the hearing of the said summonses, duly applied to him to state a case for the opinion of the King's Bench Division, in compliance with which application the following case was stated:—

CASE.

At the hearing of the said complaints and summonses the following facts were admitted or proved:—

The respondent was the owner of six houses, numbered 3 to 8 inclusive, Sun Row, in the parliamentary and metropolitan borough of Islington.

As provided by the London Government Act, 1899, the general rate of the metropolitan borough of Islington (which rate was established by the Metropolis Local Management Act, 1855) and the poor rate of the said borough are assessed, made and levied together by the mayor, aldermen and councillors of the said borough (hereinafter called "the council") as one rate, which, pursuant to the London Government Act, 1899, is termed the general rate, and, as provided by the said Act, s assessed, made, collected and levied as if it were the poor rate; by the said Act it is also provided that all enactments applying or referring to the poor rate (subject to the provisions of the said Act as to audit) are to be construed as applying or referring also to the general rate thereby established.

By the general rate for the said borough duly made, dated and sealed on March 30, 1907, by the council as overseers of the said borough, and duly allowed by two justices of the peace for

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the said county of London, in which the said borough is situate, on March 30, 1907, the respondent was rated and assessed as owner to the general rate in respect of the six houses numbered 3 to 8, Sun Row, within the said borough as follows :—

Number of House.	Gross.	Rateable.	Amount payable.
3, Sun Row	£23	£19	£1 17 2½
4, ,, ,,	39	32	3 2 8
5, ,, ,,	20	16	1 11 4
6, ,, ,,	20	16	1 11 4
7, ,, ,,	21	17	1 13 3½
8, ,, ,,	20	16	1 11 4

The respondent has never occupied nor resided in any of the said houses.

There are two tenants in each of the said houses numbered 5, 6, 7 and 8, three tenants in that numbered 3, and four tenants in that numbered 4; each tenant has a separate letting, a separate rent-book, and a separate key; and each tenant has exclusive use and occupation of his or her rooms; the only parts of the houses which are used in common are the outer doors, the passages and stairs, the water-closets, and the basement of each house used as a wash-house with copper, each of the tenants in each house using in common the said parts of the house. Two of the said houses, namely, those numbered 3 and 4, are upwards of a century old, and the others are upwards of forty years old. They were all built for the occupation of one family in each house; none of the floors or lettings in any of the said houses are self-contained, nor are such floors or lettings in the same house structurally severed from each other. There is only one door in each house in the nature of a front door, and the rooms on the several floors are entered by ordinary doors as in a house occupied by one family only.

The respondent was so rated by the council in respect of the said houses in pursuance, as the council considered, of s. 7 of the Representation of the People Act, 1867. (1) The said

(1) Representation of the People Act, 1867, s. 7: "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future

borough of Islington (then the parish of Islington) was at the date of the passing of that Act, and has ever since been, wholly situate in a parliamentary borough.

At the time of the making of the said rate in 1907 the said

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poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:—

"(1.) After the passing of this Act no owner of any dwelling house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned:

"(2.) The full rateable value of every dwelling house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier shall be entered in the rate book:

Where the dwelling house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling house or tenement shall be rated in respect thereof to the poor rate:

"Provided. . . . ."

Poor Rate and Assessment and Collection Act, 1869, s. 3: "In case the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis . . . . and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof."

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:—

"(1.) The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:

"(2.) If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated."

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houses were, and had for nine years previously been, wholly let out in apartments or lodgings, and during those years the respondent or his predecessor in title had been rated as the owner of such houses to the general rate for the said borough and, previously to its constitution, to the poor and general rates of the parish of Islington in respect of the said six houses, except that as regards those numbered 3 and 8, Sun Row, from the year 1900 to the year 1905 two persons named Overend and Wilkinson had been respectively assessed and rated as occupiers of such houses respectively under a misapprehension or misstatement that the said two persons were respectively tenants of the whole of the said two houses, but during the whole of the said nine years the respondent or his predecessors in title paid all the rates in respect of the said six houses.

At the time of the passing of the Representation of the People Act, 1867, namely, on August 15 in that year, and ever since that date, each of the said six houses was rated to the owner as a whole in one sum, and at no time in or since 1867 have any separate rooms or apartments in the said houses or any of them been separately assessed or rated.

It appears from the rate-book in 1867 that the owners of the said houses were rated in respect thereof, and that the gross estimated annual rentals and the rateable values thereof were respectively as follows:—

Number of House.	Gross Estimated Annual Rental.	Rateable Value.
3, Sun Row	£20	£10
4, ,, ,,	28	14
5, ,, ,,	80	40
6, ,, ,,		
7, ,, ,,		
8, ,, ,,		

No allowance, deduction, or abatement ever has been or is allowed or made to the respondent in respect of any of the said houses.

The council make it a practice to rate the owners instead of the occupiers of houses wholly let out in apartments or lodgings when such apartments or lodgings are not structurally separated.

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It was contended on behalf of the appellant that under the circumstances above stated the council was entitled and compelled to rate the respondent in respect of the said six houses under s. 7 of the Representation of the People Act, 1867, inasmuch as the said houses were wholly let out in apartments or lodgings not separately rated.

It was contended on behalf of the respondent—

(1.) That so much of s. 7 of the Representation of the People Act, 1867, as related to the rating of owners instead of occupiers had been repealed by implication by the Poor Rate Assessment and Collection Act, 1869. The authority relied on in support of the above contention was *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society.* (1)

(2.) That, even if the provisions of s. 7 of the Representation of the People Act, 1867, were not so repealed, it was necessary, in order to bring the said houses within the provisions of that section, for the appellant to prove that the said houses were each wholly let out in apartments or lodgings not separately rated on August 15, 1867, the date of the passing of that Act. In support of this contention the case of *Stamper* v. *Overseers of Sunderland* (2) was relied on.

(3.) That, under whatever Act the appellant purported to rate the respondent, the rate was bad, as no allowance, abatement, or deduction has ever been or is allowed or made to the respondent. The authority relied on in support of this contention was *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society.* (1)

The magistrate was of opinion that so much of s. 7 of the Representation of the People Act, 1867, as relates to the rating of owners instead of occupiers had been impliedly repealed by the Poor Rate Assessment and Collection Act, 1869, and that even in a parliamentary borough the last-mentioned Act is the only Act under which owners can be rated instead of occupiers. He therefore dismissed the said summonses.

The question for the opinion of the Court was whether the magistrate was right in law in this decision.

(1) [1892] 1 Q. B. 654. (2) (1868) L. R. 3 C. P. 388.

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Lush, K.C., and *J. W. McCarthy*, for the appellant. The decision of the magistrate is based upon the fallacy that s. 7 of the Representation of the People Act, 1867, has been impliedly repealed by the Poor Rate Assessment and Collection Act, 1869. There are no grounds for such a suggestion. The case of *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (1), on which the magistrate relied, had nothing to do with premises situate in 1867 in a parliamentary borough, and therefore the question whether s. 7 of the Act of 1867, which applies only to parliamentary boroughs, was or was not repealed by the Act of 1869 was irrelevant.

Before the passing of the Representation of the People Act, 1867, there were in existence two statutes dealing with the rateability of owners and their liability to be rated. The first was the Poor Relief Act, 1819 (59 Geo. 3, c. 12), also known as Sturges Bourne's Act. Sect. 19 of that Act recited that in many parishes payment of the poor rates was evaded by reason that numbers of houses were let out in lodgings or in separate apartments, or for short terms, or were let to tenants who quitted their residences or became insolvent before the rates charged on them could be collected. It then enacted that the inhabitants of any parish in vestry assembled might resolve and direct that the owners, being the immediate lessors of the actual occupiers, of all houses, apartments, or dwellings which should be let to the occupiers at any rent not exceeding 20*l.* nor less than 6*l.* by the year, for any less term than one year, or on any agreement by which the rent should be reserved or made payable for any shorter period than three months, should be assessed to the rates for the relief of the poor for or in respect of such houses, apartments, or dwellings instead of the actual occupiers; and the churchwardens and overseers of the poor were required to carry into effect all such resolutions and directions of the inhabitants in vestry assembled, and in pursuance and execution thereof to assess by a fair and equal pound rate the owners, being the immediate lessors of the actual occupiers, of every house, apartment, or dwelling to which such resolution and direction should extend, for or in respect of the same,

(1) [1892] 1 Q. B. 654.

according to the actual rent at which such house, apartment, or dwelling should be let, after making a reasonable deduction from such rent, not exceeding in any case one-half of the same.

The other statute in force before the Act of 1867 was the Act of 13 & 14 Vict. c. 99, commonly known as the Small Tenements Act, 1850. That Act, after reciting that the collection of rates assessed upon the occupiers of tenements of small annual value is expensive, difficult, and frequently impracticable, enacted by s. 1 that it should be lawful for the vestry to order that the owners of tenements, the yearly value whereof should not exceed 6*l*., should be rated and assessed to the rates for the relief of the poor in respect of such tenements instead of the occupiers thereof. By s. 4 of that Act it was provided that whilst such an order was in force the owner should be assessed in respect of the tenement at three-fourths of the amount at which the tenement would be liable to be rated in case the Act had not passed; and, further, that if any owner of one or more tenements should be desirous of paying a rate for one year in respect of all those tenements, whether they were occupied or unoccupied, the owner, on giving notice to that effect, should be assessed to the rates in respect to the tenements at a sum not less than one-half the amount at which the tenements would be liable to be rated, if occupied, in case the Act had not passed. The result of those two enactments was that, in the case of certain tenements specified with reference to the amount of the rent or length of the tenancy, the owners could be rated instead of the occupiers.

That being the state of the law, the Representation of the People Act, 1867, was passed. Sect. 7 of that statute enacts in the clearest terms that in parliamentary boroughs, where the owner was rated at the date of the passing of the Act in respect of a dwelling-house or tenement instead of the occupier, his liability to be rated is to cease, and no owner of any dwelling-house or tenement situate in a parish wholly or partly within a borough is to be rated to the poor rate instead of the occupier, except in the following case—namely, where the dwelling-house or tenement is wholly let out in apartments or lodgings not separately rated, in which case it is expressly

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enacted that "the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

This Act must be taken to have abrogated the Poor Relief Act, 1819, and the Small Tenements Act, 1850, so far as relates to the rating of owners instead of occupiers of tenements in parliamentary boroughs.

After the passing of that Act the only case in which the owner of a tenement situate in a parliamentary borough could be rated to the poor rate instead of the occupier was when the tenement was wholly let out in apartments or lodgings not separately rated; in that case the owner, and not the occupier, was the person to be rated.

Then came the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). Sect. 3 of that Act provided that where the rateable value of a hereditament does not exceed a specified value, and the owner is willing to enter into an agreement with the overseers to become liable for the rates for a term of not less than a year and to pay the rates whether the tenement is occupied or not, the overseers may, subject to the control of the vestry, agree with the owner to receive the rates from him, allowing him a commission not exceeding 25 per cent. on the amount of the rates. By s. 4 the vestry may order that the owners of such hereditaments shall be rated instead of the occupiers, and thereupon: (1.) The overseers shall rate the owner, allowing him a deduction of 15 per cent. from the amount of the rate; or (2.) if the owner gives notice that he is willing to be rated for a term not less than a year in respect of such hereditaments, whether the same are occupied or not, the overseers shall rate the owner accordingly and allow him a further deduction, not exceeding 15 per cent., from the amount of the rate. Sect. 6 of the Act expressly repeals the Small Tenements Act, 1850. This statute deals only with hereditaments of a particular value, and has nothing to do with the question whether they are let out in apartments or lodgings. Accordingly s. 7 of the Representation of the People Act, 1867, which deals only with tenements wholly let out in apartments or lodgings and makes no reference whatever to their value, remains unrepealed by the Poor Rate Assessment and Collection Act, 1869.

This contention derives great support from the terms of the Parliamentary and Municipal Registration Act, 1878, s. 14 of which is in the following terms: "Whereas by s. 19 of the Poor Rate Assessment and Collection Act, 1869, the overseers in making out the poor rate are required in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, to enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and it is thereby declared that every such occupier shall be deemed to be duly rated for any qualification or franchise as therein mentioned; and whereas doubts have been entertained as to the application of this enactment, and it is expedient to remove them: Be it therefore enacted that the recited enactment shall not be deemed to apply exclusively to cases where an agreement has been made under s. 3 of the same Act, or where an order has been made under s. 4 of the same Act, but shall be of general application." The meaning of that enactment is that in all cases in which the owner is rated instead of the occupier, not only those under ss. 3 and 4 of the Act of 1869, but in all others as well, the overseers are to enter in the occupier's column the name of the occupier, and then the occupier is to be deemed to be duly rated. But, besides ss. 3 and 4 of the Act of 1869, the only way in which owners can be rated instead of occupiers is by virtue of the Representation of the People Act, 1867. Therefore the Act of 1878 points unmistakably to the conclusion that s. 7 of the Act of 1867 is still in force.

Alexander Glen, K.C., and *Kyffin*, for the respondent. The mistake in the argument for the appellant is in treating as a substantive enactment that part of s. 7 of the Representation of the People Act, 1867, which enacts that, where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof. That part of the section is not a substantive enactment; it is merely an exception to the principal enactment of the section, which is that, where the owner was rated at the passing of the Act in respect of a dwelling-house or tenement instead of the occupier, the liability of

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the owner to be rated shall cease: see *Stamper* v. *Overseers of Sunderland* (1); *Thompson* v. *Ward* (2); *Boon* v. *Howard*. (3) In order to understand the effect it is necessary to bear in mind the history of the legislation affecting the rateability of owners. By the general law occupiers, and not owners, of hereditaments are rateable. At the passing of the Representation of the People Act, 1867, there were, however, in force three groups or classes of Acts by which owners could be rated instead of occupiers. These were—first, the Poor Relief Act, 1819; secondly, the Small Tenements Act, 1850; and, thirdly, a number of local Acts, including the Islington Parish Acts Amendment Act, 1857 (20 & 21 Vict. c. cxviii.), ss. 10-12, empowering the vestries to make composition with owners of hereditaments of specified annual value for the payment of rates in respect thereof. The Representation of the People Act, 1867, by s. 3 conferred the franchise on the occupiers of dwelling-houses, including in that term—see s. 61—any part of a house occupied as a separate dwelling and separately rated, in parliamentary boroughs, provided they had been rated as ordinary occupiers to all rates made in respect of their dwelling-houses and had paid an amount equal to that paid by ordinary occupiers. So long as the system prevailed under which owners of dwelling-houses situate in a parliamentary borough were rated instead of occupiers, the occupiers could not under s. 3 of the Act be properly placed upon the register of voters. It was therefore provided by s. 7 that the liability of an owner rated at the passing of the Act in respect of a dwelling-house or other tenement situate in a borough should cease, and that after the passing of the Act no owner of any dwelling-house or other tenement situate within a borough should be rated to the poor rate instead of the occupier. That is the principal enactment in s. 7. Then comes the exception—namely, that, where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof. That is to say, the owner of such a dwelling-house was rendered, or suffered to remain, liable to be rated under the Poor Relief Act, 1819, or the

(1) L. R. 3 C. P. 388. (2) (1871) L. R. 6 C. P. 327, at p. 361.
(3) (1874) L. R. 9 C. P. 277, at p. 301.

Small Tenements Act, 1850, or one or other of the local Acts, as the case might be, in force at the passing of the Representation of the People Act, 1867.

The effect of this exception was that occupiers of dwelling-houses within a tenement which was wholly let out in apartments not separately rated at the passing of the Representation of the People Act, 1867, were deprived of the franchise; because the owners of such dwelling-houses remained rateable and were rated under the Poor Relief Act, 1819, the Small Tenements Act, 1850, or some of the local Acts mentioned above, instead of the occupiers: *Stamper* v. *Overseers of Sunderland.* (1) To remedy this state of the law the Poor Rate Assessment and Collection Act, 1869, was passed. That Act by s. 6 expressly repealed the Small Tenements Act, 1850, and so much of any local statute as related to the rating of owners instead of occupiers, and by its general effect, either taken alone or in combination with earlier Acts, impliedly repealed the Poor Relief Act, 1819: *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (2); and thereby abolished the only means by which, up to the passing of that Act, owners could be rated instead of occupiers; and by ss. 3 and 4 it substituted the scheme and machinery by which alone owners were in the future to be rateable instead of occupiers. The result is that the owner of a dwelling-house or tenement wholly let out in apartments or lodgings not separately rated within the exception to s. 7 of the Representation of the People Act, 1867, can only be rated as such by virtue of s. 3 or s. 4 of the Poor Rate Assessment and Collection Act, 1869, and no rate made upon him is valid which does not allow him the commission or deduction prescribed by one or the other of those sections.

With regard to s. 14 of the Parliamentary and Municipal Registration Act, 1878, the history of that enactment is as follows: It was provided by s. 7 of the Poor Rate Assessment and Collection Act, 1869, that every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the

(1) L. R. 3 C. P. 388. (2) [1892] 1 Q. B. 654.

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overseers are empowered to make from the rate, is to be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends on the payment of the poor rate. By s. 19 the overseers in making out the poor rate, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, are directed to enter in the occupier's column of the rate-book the name of the occupier of every rateable hereditament, and the occupier shall then be deemed to be duly rated for any qualification or franchise; and if any overseer omits the name of the occupier he shall be liable to a penalty, and the occupier whose name is omitted is entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been omitted. A case had occurred of *Cross* v. *Alsop* (1), where by an informal arrangement between himself and the overseers, and not by any agreement in writing under s. 3 of the Poor Rate Assessment and Collection Act, 1869, the owner of a certain house let out in three separate dwelling-houses had agreed to become liable for the rates payable in respect of the dwelling-houses. The overseers in making out the rate-book had entered in the occupier's column the names of the three tenants of the dwelling-houses, and in their appropriate columns appeared the name of the owner, the rental, the rateable value, and the rate in the pound. No separate assessments in respect of the several dwelling-houses had been made. The tenant of one of them claimed that by virtue of s. 19 of the Act he was to be deemed to be duly rated for any qualification or franchise. But it was held that s. 19 only applied where the payment of rates by an owner was made by virtue of an agreement in writing under s. 3 or an order of the vestry under s. 4 of the Act, and that, as there had been neither one nor the other of these, the tenant could not rely upon s. 19; with the result that he failed to establish his right to vote. It was to amend this state of the law that s. 14 of the Parliamentary and Municipal Registration Act, 1878, was passed, which, after reciting that doubts had arisen as to the application of s. 19 of the Act of 1869, enacted that that section

(1) (1870) L. R. 6 C. P. 315.

should not be deemed to apply exclusively to cases where an agreement had been made under s. 3 of the same Act, or where an order had been made under s. 4 of the same Act, but should be of general application; in other words, that it should apply to a case like *Cross* v. *Alsop* (1), where the arrangement between the owner and the overseers for rating the owner was made otherwise than under s. 3 of the Poor Rate Assessment and Collection Act, 1869.

Lush, K.C., in reply.

LORD ALVERSTONE C.J. The question in this case is whether the Representation of the People Act, 1867, is to be regarded as a rating Act or not. Is it an Act dealing merely with the franchise, or was it intended to regulate the liability of owners to be rated for the general purposes of the poor rate? In my opinion it is a franchise Act, and not a rating Act properly so called; it only deals with rating as incidental to the qualification for the franchise, and was not intended further or otherwise to affect the general law as to the right or liability of persons to be rated for the relief of the poor. In the year 1867 there were in force the Poor Relief Act, 1819, and the Small Tenements Act, 1850, as well as a number of private Acts under which owners of hereditaments could be rated. That is a fundamental fact. By the statute of Elizabeth, which first imposed the poor rate, as interpreted by subsequent decisions, occupiers only could be rated. I understand the effect of s. 7 of the Representation of the People Act, 1867, to be this: In many boroughs other Acts of Parliament had allowed the general law, by which occupiers alone were rated, to be altered so that in many cases the owners were rated instead of the occupiers; now as these occupiers, not being rated, could not claim the benefit of the dwelling-house franchise established by the Representation of the People Act, 1867, that franchise being conditional upon the occupier of the dwelling-house being rated, the Act of 1867 provided by s. 7 that thenceforth occupiers should be allowed the benefit of being on the rate-book and so qualified to vote; the enactment was not, however, to apply in the case of hereditaments

(1) L. R. 6 C. P. 315.

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wholly let out in apartments or lodgings not separately rated, in which case the owners were to remain rateable. The whole intention of the enactment was that in the case of separately rated dwelling-houses the occupiers should be rated so as to qualify them for the franchise then newly established. It is not concerned either with the amount of the rate or the method by which it is to be imposed or levied.

Subsequently the Poor Rate Assessment and Collection Act, 1869, was passed. That was an Act of general application. It is intituled, "An Act for amending the Law with respect to the rating of Occupiers for Short Terms, and the making and collecting of the Poor's Rate." That it was an Act of general application is clear from s. 6 thereof, which provides that the statute 13 & 14 Vict. c. 39, with respect to the rating of small tenements—i.e., the Small Tenements Act, 1850—and so much of any local statute as relates to the rating of owners instead of occupiers, shall be and the same are thereby repealed, so far as they apply to any poor rate made after the Act came into operation. It does not in terms repeal the Poor Relief Act, 1819, probably because the Legislature regarded the repeal of that Act as involved in the repeal of the Small Tenements Act, 1850, which had in effect merely removed one of the limits of value imposed by the Poor Relief Act, 1819. In ss. 3 and 4 of the Act of 1869 machinery is provided for rating the owner instead of the occupier in case of hereditaments of the specified rateable values; and the owner is to be allowed a commission on or deduction from the amount of the rate. Now it is to be observed that the Poor Relief Act, 1819, and the various local Acts, including the Islington Parish Acts Amendment Act, 1857, contained machinery similar to that in ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, whereby the vestries might interpose and, whether by order or agreement, collect the rates from the owners of hereditaments, compensating them for their liability by allowing them a commission on or deduction from the amount of the rate; but these Acts gave the occupier no right to be placed upon the rate-book. The object of the Representation of People Act, 1867, was to give occupiers that right. The object of ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, was quite distinct and

different. Its object was, not to put occupiers upon the rate-book, but to provide machinery for rating owners. The scope and purpose of the two enactments was different, and I am not prepared to say that the later repeals the earlier. But, however that may be, when the question is as to the rating of owners, and their rights and liabilities when rated, the statute to be considered is not the Representation of the People Act, 1867, but the Poor Rate Assessment and Collection Act, 1869.

Mr. Lush made another point, namely, that s. 14 of the Parliamentary and Municipal Registration Act, 1878, shewed that the Legislature regarded s. 7 of the Representation of the People Act, 1867, as applicable to the rating of owners for the purpose, not only of the franchise, but of the poor rate also. Sect. 14 of the Act of 1878 recites that by s. 19 of the Act of 1869 the overseers in making out the poor rate are required in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, to enter in the occupier's column of the rate-book the name of the occupier of every rateable hereditament, and that it is thereby declared that every such occupier shall be deemed to be duly rated for any qualification or franchise as therein mentioned. The section then goes on to recite that doubts had been entertained as to the application of this enactment, and that it was expedient to remove them; it then proceeds to enact that the recited enactment shall not be deemed to apply exclusively to cases where an agreement has been made under s. 3, or where an order has been made under s. 4 of the Act of 1869, "but shall be of general application." Mr. Lush argued that owners cannot be rated instead of occupiers except by statute; and that, apart from s. 3 and s. 4 of the Act of 1869, the only statutory enactment permitting an owner to be rated instead of an occupier is s. 7 of the Representation of the People Act, 1867. But, apart from the possible existence of other statutes enabling owners to be rated instead of occupiers, I am not prepared to assent to the view that when enacting s. 14 of the Parliamentary and Municipal Registration Act, 1878, the Legislature was contemplating only cases in which by some statutory provision the owner had become liable instead of the

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occupier. The section may be intended to meet the state of facts in *Cross* v. *Alsop* (1), where the liability of the owner was created by arrangement between himself and the overseers, apart from the provisions of any statute.

I agree with Mr. Lush in thinking that *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (2) does not conclude this case, because that was not, as this is, a case dealing with the rating of a tenement which in 1867 was situate within a parliamentary borough. But for the reasons I have given I think that the position of owners who are to be rated instead of the occupiers of hereditaments is now governed by the Poor Rate Assessment and Collection Act, 1869, and not by the Representation of the People Act, 1867, and that the claim of the appellants to rate the respondent under s. 7 of the Act of 1867 is one which cannot be supported. This appeal must therefore be dismissed.

A. T. LAWRENCE J. I am of the same opinion. I think the mistake on which the argument of the appellant in this case is based consists in reading s. 7 of the Representation of the People Act, 1867, as a substantive rating enactment. I regard it as merely machinery for the purposes of the franchise, and as having no intention to alter the amount, incidence, or collection of the rates. It is intituled "An Act further to amend the Laws relating to the Representation of the People in England and Wales," and contains no provision leading to the suggestion that it is an Act intended in any way to affect the amount of the rate or the liability of the owner on its collection. It was contended that when the Poor Rate Assessment and Collection Act, 1869, was passed and by s. 6 repealed the Small Tenements Act, 1850, the effect was that there was imposed upon the owners of tenements of this kind the burden of paying the rates without being allowed any deduction. This, it was argued, was the effect of s. 7 of the Representation of the People Act, 1867. I do not think that was the meaning of the Act of 1867. Its object was only to put the rate-book in a condition to furnish evidence of the persons qualified to vote as

(1) L. R. 6 C. P. 315. (2) [1892] 1 Q. B. 654.

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far as the payment of rates was concerned. I am not prepared to hold that s. 7 of that Act is repealed. Independently of that contention, the argument for the respondent in my opinion prevails; the rating authority to rate owners instead of occupiers must do so under, and make the allowances prescribed by, the Poor Rate Assessment and Collection Act, 1869.

SUTTON J. I agree, and have nothing to add.

Appeal dismissed.

Solicitor for appellant: *A. M. Bramall.*
Solicitor for respondent: *Herbert A. Phillips.*

W. H. G.

[IN THE COURT OF APPEAL.]

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Jan. 20; *Feb.* 20.

ARNOLD & BUTLER *v.* BOTTOMLEY AND OTHERS.

Practice — Discovery — Libel — Justification — Particulars of Justification — Allegations of Misconduct — Inspection of Plaintiffs' Books.

A defendant to an action for libel who pleads a justification must state in his defence or in his particulars of justification the specific facts or instances upon which he relies in order to prove his plea, and he can obtain inspection of the plaintiffs' books or documents only in respect of such specific facts or instances.

To an action by a firm of stock and share dealers for a libel in a newspaper, the innuendo placed upon the alleged libel being that it meant that the plaintiffs carried on their business in an improper manner and were fraudulent stock and share dealers and persons who could not be trusted in business dealings, the defendant pleaded a justification and delivered particulars of the plea, in which he alleged that the plaintiffs were not members of the London Stock Exchange, but were concerned in running a "bucket-shop," and that they did not carry on the ordinary and legitimate business of stockbrokers, but were entirely dependent for their profits upon the losses made by their customers. In a further set of particulars the defendant gave the names of, and extracts from, certain pamphlets on methods of money-making issued by the plaintiffs. In neither set of particulars did the defendant give any specific instance of the commission by the plaintiffs of any fraudulent or improper act, or the name of any person alleged to have been defrauded by, or to have suffered loss at the hands of, the

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plaintiffs. The defendant having taken out a summons for an order that he should be at liberty to inspect the books of the plaintiffs for a certain period:—

Held, that, as the particulars of justification contained no specific instances of the misconduct alleged, they were too general to entitle the defendants to inspection of the plaintiffs' books.

Yorkshire Provident Life Assurance Co. v. *Gilbert*, [1895] 2 Q. B. 148, discussed and followed.

APPEAL of the defendant Bottomley from an order of Pickford J. at chambers.

The plaintiffs, a firm of stock and share dealers, sued the defendants, who were the editor and publishers of a newspaper called *John Bull*, to recover damages for an alleged libel published in that paper. The libel alleged in the statement of claim consisted in publishing of the plaintiffs a statement that they were "wrong 'uns," the innuendo being that it meant that the plaintiffs carried on their business in an improper manner and that they were fraudulent stock and share dealers and persons who could not be trusted in business dealings. The defendant Bottomley having admitted publication and pleaded a plea of justification, an order was made upon him to give particulars as to how and in what respect he alleged the plaintiffs to be "wrong 'uns." The particulars delivered under this order alleged that the plaintiffs were not members of the London Stock Exchange, but were concerned in running what was known as a "bucket-shop"; that they did not carry on the ordinary and legitimate business of stockbrokers, but were entirely dependent for their profits on the losses made by their customers, to whom they held themselves out as giving and pretending to give independent and unbiassed advice as to their dealings; that the plaintiffs represented that they transacted free of commission all business entrusted to them, and that they had discovered a new and scientific method of making large profits with very small risks; and, further, that they falsely represented that their customers who acted on their advice had made large profits. On the application of the plaintiffs an order was made for further and better particulars. The particulars then delivered, which were of great length, specified the issue by the plaintiffs of pamphlets on the "Modern Methods of Money-making" and the "Scientific

Increase of Income," and a circular called the "London Stock Exchange Report," in some or all of which the plaintiffs were called stock and share dealers and general bankers and were recommended as vigilant and experienced, and as being experts in investment matters. The defendant Bottomley then took out a summons for inspection, asking that the plaintiffs should be ordered to disclose their books for a certain period, upon which summons the Master made an order that the defendant should be at liberty to inspect the books relating to the plaintiffs' business from January 1, 1906, to October 13, 1906, and that the plaintiffs should be at liberty to seal up all names and addresses in their books. Upon appeal Pickford J. reversed the Master's order.

F. E. Smith, for the defendant Bottomley. The order of the learned judge was wrong, and that of the Master should be restored. It is true that the particulars do not in terms give any specific instance of misconduct on the part of the plaintiffs as a fact upon which the defendant will rely in support of his plea of justification; but it is only necessary that particulars should allege with sufficient particularity the matter which shews the nature of the charge of misconduct. Pickford J. based his decision on *Yorkshire Provident Life Assurance Co.* v. *Gilbert* (1), where it was held that, when the defendant in an action for libel delivered particulars in support of a plea of justification, the issues to be tried under the plea were limited to the matters referred to in the particulars, and that the defendant's claim for discovery of documents must be limited to documents relating to those matters. The only principle upon which, when dealing with an action for libel, the area of discovery can be restricted is that the party will not be entitled to discovery if the application is of a fishing nature; that is not so in the present case, for the allegations made against the plaintiff are definite, although it is true that no specific instances are given, and the discovery sought is relative to those allegations. The nature of the business carried on by the plaintiffs is clearly set out in the particulars, which are really statements of facts that have happened, and not

(1) [1895] 2 Q. B. 148.

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mere general representations. Substantially the allegation is that the plaintiffs were not stockbrokers at all, but that they acted as principals, and that they made their profits by betting with their own customers; the books of which discovery is sought are relevant to that issue. The statements of the plaintiffs in their pamphlets that no commission or brokerage or fees are charged are matters as to which the defendants are entitled to know whether they are supported by the entries in the plaintiffs' books. Having regard to those pamphlets, and to the suggested inferences therefrom in the particulars of justification, the discovery asked for falls within the recognized limits of discovery in libel actions and should be granted. [He also cited *White & Co.* v. *Credit Reform Association*. (1)]

Shewell Cooper (*Duke, K.C.*, with him), for the plaintiffs. The order of the judge at chambers is right. Having regard to the form of the particulars of justification, the plaintiffs have disclosed everything that they can be required to disclose. The answer of the defendants to the order for further and better particulars really amounts to saying that the representations of the plaintiffs were all made by means of pamphlets and circulars; this can be proved by the production of the pamphlets and circulars themselves without the necessity of any inspection of the plaintiffs' books. The least indefinite allegation in the particulars is that the plaintiffs are dependent for their profits on the losses of their customers; but no specific instance is given, and the allegation amounts merely to a general statement, and is not a particular at all in the proper meaning of that term. The particulars should state the facts relied upon in support of the plea of justification: *Zierenberg* v. *Labouchere*. (2) The discovery asked for is not relevant to any issue as to the pamphlets; assuming that these disclose an intention to employ an objectionable system of business, the particulars do not give a single instance in which the intention was in fact carried out. [He also cited *Metropolitan Saloon Omnibus Co.* v. *Hawkins*. (3)]

Cur. adv. vult.

(1) [1905] 1 K. B. 653. (2) [1893] 2 Q. B. 183.
(3) (1859) 4 H. & N. 146.

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Feb. 20. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal against an order of Pickford J., dated December 9, 1907, setting aside the order of Master Macdonell, dated December 5, 1907, which gave the defendants "liberty to inspect the plaintiffs' books from January 1, 1906, to October 13, 1906; the plaintiffs to be at liberty to seal up all names and addresses." I think that the order of Pickford J. was right, and that this appeal ought to be dismissed.

Prior to the making of this application for inspection the defendants had been ordered to give, and had given, particulars and further particulars of a plea of justification in an action for libel brought by the plaintiffs, who are stock and share dealers, against the defendants Bottomley, the editor, and Odhams, Limited, the printers and publishers of a newspaper called *John Bull*. Now these particulars constitute a part of the pleadings, having been ordered under Order XIX., r. 7, which runs thus: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." These particulars, which are part of the pleading, in substance charge the plaintiffs with being fraudulent dealers in stocks and shares, for whatever uncertainty there may be as to the meaning of the word "bucket-shop," the defendants' counsel in the course of the argument before us himself averred that in these particulars the word "bucket-shop" was used in this sense. Now, as the defendants by their pleading rely on fraud, the particulars must allege the fraud distinctly, for "general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice": *Wallingford* v. *Mutual Society*, per Lord Selborne. (1)

It is plain that the defendant Bottomley in this case is not entitled to inspection unless and until he has by his particulars precisely stated the facts on which he relies in support of his plea of justification; in my judgment he has not by his particulars so stated any facts as to entitle him to inspection. Particulars

(1) (1880) 5 App. Cas. 685, at p. 697.

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have been twice delivered by this defendant. The first two paragraphs of the first particulars run as follows: "By way of particulars of how and in what respects the plaintiffs were or are 'wrong 'uns' this defendant says (1.) that the plaintiffs are not members of the London Stock Exchange, but are concerned in running what is known as a 'bucket-shop'; (2.) that the plaintiffs do not carry on the ordinary and legitimate business of stock-brokers, but are entirely dependent for their profits upon the losses made by their customers, whom they hold themselves out to and to whom they pretend to give independent and unbiassed advice as to dealings." The particulars are too general. The defendant, in order to validate his defence to the charge that he falsely and maliciously published, printed, and circulated of and concerning the plaintiffs that they were "wrong 'uns," meaning thereby that the plaintiffs carried on their said business in an improper manner and were fraudulent stock and share dealers and were persons who could not be trusted in their business dealings, must by his particulars state specific facts which he means to prove in support of his plea. These paragraphs, in my opinion, do nothing of the sort and are simply general statements. It may be that the remainder of these particulars, coupled with the second particulars, allege with sufficient particularity the issue by the plaintiffs of publications which on their face are fraudulent and misleading, but it is obvious that inspection cannot be wanted to enable the defendants to prove this part of their case, and it is to my mind obvious that this inspection is only asked for by the defendants in order to enable them to fish out from the plaintiffs' books particular instances in order to enable them to support their plea of justification.

FARWELL L.J. read the following judgment:—A defendant in a libel action who pleads justification must state in his defence or particulars the facts on which he relies to prove such justification, and he can obtain discovery only in respect of such facts so stated: *Yorkshire Provident Life Assurance Co.* v. *Gilbert.* (1) The rule in respect of allegations of fraud in an action to open settled accounts is the same in that the allegations of fraud must

(1) [1895] 2 Q. B. 148.

be supported by a statement of specific instances, but is different in that the statement of one or more specific cases will, as a general rule, entitle the plaintiff to full discovery not limited to the specific cases only: *Williamson* v. *Barbour* (1); and the same rule was applied by Chitty J. in an action for fraudulent misrepresentation by passing off the defendant's coal as the plaintiffs' coal in *Waynes Merthyr Co.* v. *Radford*. (2) Whatever may be the reason for the distinction, it is well settled; and the *Yorkshire Provident Case* (3) is a decision of this Court on the point, and is, of course, binding on us. In that case the defendants stated thirty cases in which they alleged that the plaintiffs had refused to pay; if the defendants had been plaintiffs in an action alleging fraud and seeking to open accounts on that ground, it is plain that, on giving thirty instances, or indeed one or two, of fraudulent entries, they would have been entitled to inspection of all the defendants' books; but the defendants in the *Yorkshire Provident Case* (3), although they alleged a general course of dealing, of which the thirty cases were instances, were allowed inspection only in respect of the thirty instances given, on the ground that such was the proper rule in a libel action.

In the case before us the defendant has justified by alleging that the plaintiffs kept a bucket-shop and by giving particulars of invitations to deal with them on certain terms which he alleges shew that they are carrying on a business of gambling in stocks, in which they pretend to advise their clients what to buy and to sell but themselves sell to or buy from them, so that their interest is in direct conflict with that of their clients, and he also alleges that the plaintiffs in fact carry on business in accordance with such invitations and make their profit out of their own clients accordingly. He requires no discovery in respect of his allegations founded on excerpts from the plaintiffs' own pamphlets, and he alleges no specific instance of any actual buying or selling; and although it may well be that at the trial it may be successfully contended that the inference that the plaintiffs did in fact so carry on business is irresistible, yet such inference will be a conclusion drawn from the general facts of the case when

(1) (1877) 9 Ch. D. 529. (2) [1896] 1 Ch. 29.
(3) [1895] 2 Q. B. 148.

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proved, and cannot be treated as a specific fact now alleged in support of which discovery of books can be required. The question is one simply and solely of production of books, and I do not think that we ought to unsettle a settled rule by attempting to draw subtle distinctions between the *Yorkshire Provident Case* (1) and the present. I am therefore of opinion that Pickford J. was right and that this appeal should be dismissed.

KENNEDY L.J. read the following judgment:—In my opinion the decision of Pickford J., against which the defendant Horatio Bottomley has appealed, was perfectly right.

The defendants are sued for libel. It is alleged by the plaintiffs, who describe themselves as stock and share dealers, that the defendants have published in a newspaper language which, according to the allegations of the statement of claim, imputes to the plaintiffs that they carry on their business in an improper manner, and are fraudulent stock and share dealers, and are persons who could not be trusted in their business dealings. The defence pleaded by the defendant Horatio Bottomley is a justification. An order was made for particulars of this plea, and under that order the said defendant delivered particulars, divided into eight paragraphs, alleging in substance against the plaintiffs a system of dishonest dealing created and maintained by the publication, in specious circulars, pamphlets and letters, of false and alluring statements of their methods of business, and by the gains derived by the plaintiffs from the pecuniary losses of those persons to whom they were pretending to give independent and unbiassed advice as to investments. In further particulars, ordered by a Master, the said defendant, in substance, merely added to the original particulars a statement of the titles and contents of the publications which had been referred to generally in the original particulars. No names of persons who dealt with the plaintiffs or had been tricked by them, or instances of any actual transactions with clients, were given either in the original or in the further particulars, nor was any particular unpublished document in the plaintiffs' possession referred to. The said defendant then obtained from a Master an order giving the

(1) [1895] 2 Q. B. 148.

defendants liberty to inspect the plaintiffs' books relating to the plaintiffs' business from January 1, 1906, to October 13, 1906, the plaintiffs to be at liberty to seal up all names and addresses. This order the learned judge set aside, and his order was the subject of the appeal to this Court.

It appears to me that we could not accede to the appellant's contention without deviating from a settled and, I will add, as it appears to me, a right practice in the case of libel actions. The defence of the defendant Bottomley, broadly put, is, "I say that you have been carrying on, under the title of stock and share dealers, an illegitimate and dishonest business, and have been inducing people to deal with you by untrue or grossly misleading statements as to your course of dealing and the advantages which will result to persons who will entrust their investments to you. I do not give any reference to any particular person who has dealt with you, or to any particular transaction in which you have been concerned, or to any particular document in your possession; but I hope to find evidence in support of my justification by examining the entries in your books between January 1, 1906, and October 13, 1906." I am of opinion that the allegation of a system of wrong-doing is a wholly insufficient basis for a claim to inspect the plaintiffs' business books.

In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1) a defendant (a shareholder in the plaintiff company) was sued for a libel imputing insolvency to the plaintiff company. He was held by the Court of Exchequer to be not entitled, on the strength of such a general allegation, to inspection of the plaintiffs' books. In giving judgment Pollock C.B. observed: "We cannot notice the defendant otherwise than as a person defending an action for libel—not as a partner or shareholder; and we ought to refuse him assistance just as we should refuse any other defendant who libelled a merchant by saying he was insolvent, and then asked for an inspection of his books in order to prove it. A merchant, who is libelled by a statement that he is insolvent, has a right to maintain an action; and the defendant has no right to say: 'Let me examine all his affairs, for, if you do, I have some chance of proving that he is insolvent.'" And Martin B., speaking of

(1) 4 H. & N. 146.

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the right of a defendant in an action for libel, stated "he would be bound to give to the tribunal to which he applied reason to believe that there was some particular document, which he could specify and put his hands upon, which would support his case; and neither a court of law or equity would give him an opportunity of searching the plaintiffs' books in order to get up a defence." Watson B., referring to the case of *Macaulay* v. *Shackell* (1), which had been cited in argument, said: "The House of Lords never meant to say that in every case of an action for libel the defendant is entitled to a discovery. It is a monstrous proposition that, if a person chooses to libel any mercantile firm, large or small, and then pleads a justification to an action, he has a right to inspect and take extracts from every book or document they possess."

A comparatively recent decision of this Court in *Yorkshire Provident Life Assurance Co.* v. *Gilbert* (2) has been in complete accord with the judgments in the Court of Exchequer which I have just quoted. It is, indeed, in one respect more strikingly adverse to the contention of the present appellant, because there the defendant, who had pleaded a justification to an action for libel, had specified in his particulars thirty instances justifying the alleged libel that "the plaintiff company habitually refuse to pay just and legal claims upon policies of insurance issued by the plaintiff company"; whereas here the defendant Horatio Bottomley, similarly alleging in his defence a system of dishonesty against the plaintiffs, has not specified one single instance. Nevertheless the Court of Appeal held that the defendant in the case I am now citing must, in regard to his discovery, be strictly confined to that which related to the particular instances which his particulars alleged, and could not be allowed a general right of inspection. Lindley L.J., in the beginning of his judgment, refers with approval to the case in the Court of Exchequer and to the later judgment of the Court of Appeal in *Zierenberg* v. *Labouchere* (3), and sums up the law applicable to the case in a passage of which I will quote three short sentences: "The defendants' right then is to have discovery of all matters relating to the questions in issue as narrowed by the particulars.

(1) (1827) 1 Bli. (N.S.) 96. (2) [1895] 2 Q. B. 148.
(3) [1893] 2 Q. B. 183.

I do not think in a libel action he is entitled to get anything more. . . . . I think it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not."

In accordance with these authorities, I hold that in the present case, as the defendants' particulars and further particulars allege merely in general terms an improper course of business, supported by certain named untruthful and misleading publications, the defendant is not entitled to discovery and inspection of the plaintiffs' books in order to find, if he can, evidence of particular transactions which are not mentioned, or even referred to, in any part of either set of particulars.

Appeal dismissed.

Solicitor for plaintiff: *A. H. Holmes.*

Solicitor for defendant Bottomley: *H. W. Chatterton.*

W. J. B.

[IN THE COURT OF APPEAL.]

CROZIER, STEPHENS & CO. *v.* AUERBACH.

Practice—Writ of Summons—Service out of Jurisdiction—Breach of Contract, whether within or out of the Jurisdiction—Contract for Sale of Goods c.i.f.—Order XI., *r* 1 (*e*).

Goods were sold under a c.i.f. contract by a foreigner carrying on business and resident abroad to purchasers in England, who paid the price in exchange for the bill of lading. On inspection of the goods after their arrival in England, the purchasers alleged that they were not of the description stipulated for in the contract, and obtained leave to issue a writ, of which notice was to be served (and was served) on the defendant out of the jurisdiction, claiming a return of the money paid or damages for breach of contract:—

Held that, the contract of sale being a c.i.f. contract, the alleged breach had taken place out of the jurisdiction, and that therefore the case did not fall within Order XI., r. 1 (*e*), and the writ and service must be set aside.

Barrow v. *Myers*, (1888) 4 Times L. R. 441; 52 J. P. 345, overruled.

APPEAL of the defendant from a decision of Bigham J. at chambers.

The defendant was a foreigner residing and carrying on business

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at Hamburg; the plaintiffs carried on business at Newcastle-upon-Tyne. On February 23, 1907, the defendant at Hamburg by a letter of that date entered into a c.i.f. contract for the sale of aluminium to the plaintiffs; the material parts of the letter are as follows: "Herewith I beg to confirm having sold to you . . . . aluminium guaranteed 98-99 per cent. in notched bars, about ten tons, 174*l.* per ton, c.i.f. Tyne-Thames; unpacked; net cash against bill of lading; February-March at my option for works." A port in England having been named by the plaintiffs as the place to which the goods were to be consigned, the aluminium was shipped c.i.f. by the defendant at Hamburg on board a steamer not belonging to himself or to the plaintiffs; the price was paid by the plaintiffs in exchange for the bill of lading. Upon the arrival and inspection of the aluminium in England the plaintiffs alleged that it was not in accordance with the quality stipulated for in the contract, and claimed damages for the alleged breach of contract; the defendant denied that any breach of the contract had been committed. Eventually the plaintiffs obtained leave to issue a writ against the defendant and to serve notice of its issue out of the jurisdiction; by the writ they claimed a return of the money paid for the aluminium, or damages for the alleged breach of contract. Notice of the issue of the writ was in due course served on the defendant at Hamburg. The defendant, in his correspondence, protested against the jurisdiction of the English Courts, but the solicitor then acting for him in England entered an appearance for him, apparently under a mistake and without instructions to do so. A summons was then taken out on behalf of the defendant to set aside the appearance entered for him and to also set aside the order giving leave to issue the writ and serve the notice of its issue out of the jurisdiction. Bigham J. refused to set aside the appearance, on the ground that the defendant's letters after service upon him of the notice amounted to a waiver of his objection and to an admission of the competency of the English Courts.

The defendant appealed.

Schiller, for the defendant. The case does not fall within Order xi., r. 1 (*e*), for the action is not founded upon a breach

within the jurisdiction of the contract between the parties. Where goods are sold under a c.i.f. contract, the property in the goods passes to the purchaser at the port of shipment, and the breach of the contract occurs at the same place: *Hamlyn* v. *Griendtsveen Co.* (1); *Tregelles* v. *Sewell* (2); *Wancke* v. *Wingren* (3); *Parker* v. *Schuller.* (4) The breach, if any, was therefore at Hamburg, and there has been no breach within the jurisdiction which could bring the case within Order xi., r. 1 (*e*).

Compton-Smith, for the plaintiffs. The contract being a c.i.f. contract, it may be that there was a breach at Hamburg; but the decision in *Barrow* v. *Myers* (5) shews clearly that there was also a breach within the jurisdiction at the port of delivery. It must be admitted that the property in the aluminium passed to the plaintiffs at Hamburg, but they were never in possession of, nor had they any opportunity of inspection of, it until it arrived at the port of delivery in England; under such circumstances the proper view is that there was a continuing breach, which was the view taken by Manisty J. in *Barrow* v. *Myers.* (5) *Hamlyn* v. *Griendtsveen Co.* (1) and the other cases relied on by the defendant are distinguishable; they were actions for non-delivery of goods to the purchasers, and obviously in such cases the breach occurs at the place where the delivery should have been made to the purchaser, which, in the case of a c.i.f. contract, would be at the port of loading, where the property passes; in the present case the breach is for the delivery of goods not according to contract quality, which is only ascertainable upon inspection, and under the contract the place for inspection is impliedly England. The decision in *Barrow* v. *Myers* (5) was right, and concludes the present case.

Schiller, in reply. *Barrow* v. *Myers* (5) is in conflict with all the other authorities, and should be overruled.

Cur. adv. vult.

1908. March 2. VAUGHAN WILLIAMS L.J. The question in this case is whether the circumstances are such as to bring it

(1) (1890) 6 Times L. R. 225, 274.
(2) (1862) 7 H. & N. 574.
(3) (1889) 58 L. J. (Q.B.) 519.
(4) (1901) 17 Times L. R. 299.
(5) 4 Times L. R. 441; 52 J. P. 345.

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within Order XI., r. 1 (*e*), so as to justify the issue of a writ, notice of which is to be served out of the jurisdiction. The words of paragraph (*e*), so far as they are material, are as follows: "(Where) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." It has been decided more than once that the performance within the jurisdiction need not be a performance within the jurisdiction for which there is express provision in the contract between the parties; it is sufficient to bring a case within Order XI., r. 1 (*e*), if, upon a right construction of the contract, it can be seen that the intention of the parties was to enter into a contract for delivery within the jurisdiction. In the present case we have to deal with a c.i.f. contract for the sale of goods destined for ultimate delivery in the Tyne or Thames, but under that contract delivery is to be on board a vessel, which was neither the vendor's nor the purchaser's vessel, at Hamburg. The goods, which were aluminium, were alleged by the plaintiffs not to be of contract quality. The plaintiffs had not in fact an opportunity of examining the goods before acceptance until they examined them in England; they then discovered, or thought they discovered, that the goods were not according to contract, and this is the breach which is relied on as bringing the case within Order XI., r. 1 (*e*). There can be no doubt that, if the goods were in fact not in accordance with the contract, there was a breach of the contract on the defendant's part at Hamburg. There is ample authority to shew that this is the law, and I should not have had the slightest hesitation in holding on the authorities that the breach did not occur within the jurisdiction, but at Hamburg, had it not been for the case of *Barrow* v. *Myers* (1), in which Manisty J. and Mathew J., two great authorities on such subjects, held in respect of a c.i.f. contract for the delivery of choice apples at New York for carriage to London under which they arrived in bad order in London, their condition not being due to sea damage, that there was under the c.i.f. contract a breach of the contract in London. I am unable to understand that decision. I should have thought that under

(1) 4 Times L. R. 441; 52 J. P. 345.

a contract for delivering goods at New York freight and insurance paid, the goods being then at the purchaser's risk; the breach would be not shipping at New York goods in accordance with the quality stipulated for in the contract. Manisty J. speaks of a continuing breach, though he admits that the expression is hardly accurate; Mathew J. says: "The object which the plaintiffs sought to obtain by this contract was the delivery to themselves in London of apples of a certain quality. That being so, there was a contract which according to the terms thereof ought to be performed within the jurisdiction." I cannot understand how that construction came to be placed by the learned judge upon the contract. It is true that the contract spoke simply of London, but I fail to see how a construction which makes London the place for delivery by the vendor can be consistent with a c.i.f. contract, which the contract in that case was. And not only is there this striking inconsistency, but further I cannot think that the fact that the purchaser's ultimate object was to get sound apples of a particular quality in London can bring the case within the rule that there need not, in order to bring the breach within Order xi., r. 1 (*e*), be a provision in express words that delivery under the contract shall be performed within the jurisdiction, but that without express words to that effect the Court may hold that a case is one in which the breach has occurred within the jurisdiction if, on the true construction of the contract, the Court can find that this was the intention of the contracting parties.

Cases were cited to us for the proposition that under a c.i.f. contract the delivery must be a delivery on the ship at the port of departure, and it was said in answer that they were all cases in which the action was for non-delivery as distinguished from an action for delivering goods alleged not to be of contract quality. For myself, I cannot see that it makes any difference whether the action is for non-delivery or for delivering goods not according to the quality stipulated for in the contract; in either case the time and place of delivery are the time when and the place where the vendor delivers the goods on board ship, it being admitted that the property in the goods passes to the purchaser at the moment of delivery on board and that they are at the

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purchaser's risk throughout the voyage. But that is the proposition for which *Barrow* v. *Myers* (1) is said to be an authority. I have already said that I do not understand that decision; I have no quarrel with the actual words of the judgment of Mathew J.; my difficulty is that that judgment does not accord with the facts of the case; it seems to overlook the fact that the contract was a c.i.f. contract; the learned judge speaks of the contract as if the place of delivery had not been on board ship at New York, but had been London. All I can say is that, if the judgment is read in accordance with the facts which appear in the report, and if the judgment means that under such circumstances the breach would occur at the place of ultimate destination of the goods and not at the place of shipment under a c.i.f. contract, I say with deference, but without hesitation, that that case was wrongly decided. It may be that the account in the report is not strictly accurate, and I observe that, although the case is referred to both in the Annual Practice and the Yearly Practice, it has not found its way into the text-books, and it may very possibly be that the reporters who abstained from reporting it had a difficulty in reconciling the decision with the facts. Be that as it may, there has in the present case been no breach within the jurisdiction justifying the issue of the writ. I ought to add, as this is an appeal from Bigham J., that he does not seem to have given any decision on the point which I have discussed, his decision appearing to proceed entirely on the ground that the letters written by the defendant after service of notice of the writ upon him were such as to amount to a waiver of any objection to the writ and to admit the competency of the English Courts; he did not consider the point that the alleged breach occurred under a c.i.f. contract.

FARWELL L.J. read the following judgment:—I am unable to agree with the view of Bigham J. that the defendant gave authority to his agent's solicitor to appear for him. The defendant is a foreigner, and his letters are translated and are not very clear, but the one thing that appears to me to be absolutely clear in them is his determination not to submit to the jurisdiction of the

(1) 4 Times L. R. 441; 52 J. P. 345.

English Courts. [His Lordship here read two extracts from the defendant's letters.] It is unfortunate that the learned judge should have taken this view, as we are thereby deprived of the assistance of his opinion on the interesting point that has been argued.

The question is one of the construction of the contract, and, in order to satisfy the provisions of Order xi., r. 1 (*e*), it must be a contract "which, according to the terms thereof, ought to be performed within the jurisdiction." Now a contract has to be performed by both parties, and the performance by one may be in one place and by the other in another. In the present case the defendant's duty was to ship the goods at Hamburg c.i.f.; the plaintiffs' duty was to pay cash against bill of lading, which they did, and to accept the goods if satisfactory, when they reached here, with the right to a reasonable time to inspect. But their acceptance or refusal had nothing to do with the performance by the defendant of his part of the contract; the defendant's contract was performed or broken when the goods had been shipped; the property and the right to possession then passed to the plaintiffs, and, as the plaintiffs paid for them, without any possibility of stoppage in transitu; the defendant could not have withdrawn them from the ship; the goods were thenceforward at the plaintiffs' risk, the insurance was theirs, and nothing remained to be done by the defendant. If it was a case of non-delivery, the case is covered by authorities binding upon us, and I am unable to see any difference between non-delivery and faulty delivery. The time and place at which proper delivery ought to take place is the same in both cases, and the fact that the performance by the plaintiff of his part of the contract is postponed in time and different in place appears to me to have no bearing on the defendant's performance. The difficulty is occasioned by the decision in *Barrow* v. *Myers*. (1) So far as the report shews, there was no express contract in that case to ship at any place; the contract is stated to have been simply, "We make you offer of 300 boxes evaporated choice apples 53*s*. per cwt., c.i.f., London." The plaintiffs telegraphed back a counter-offer of 50*s*. per cwt., and the defendants at once accepted this by telegram. If we compare this with the judgment of

(1) 4 Times L. R. 441; 52 J. P. 345.

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Day J. in *Wancke* v. *Wingren* (1), this may be the reason for the decision. Mathew J. seems to have read the contract as a simple bargain to deliver in London. I confess that this is not satisfactory to my mind, because it was a c.i.f. contract, which necessarily involves a contract to ship, and because Manisty J. certainly treats the contract as broken both in America and in England and speaks of a continuing breach, which in such a case is unintelligible to me. The reasoning of both Day J. and A. L. Smith J. in *Wancke* v. *Wingren* (1) applies to all c.i.f. contracts. Day J. says: "Accordingly the stipulation was introduced that the buyer was to adopt the charterparty and bill of lading and pay the freight. Thus the buyer indemnifies the seller against these charges, but takes credit for their payment. It appears to me perfectly plain that these goods were at the risk of the buyer directly they were placed on board ship. The breach of contract complained of here, accordingly, never took place within the jurisdiction, but outside it, and the case does not come within the contemplation of Order XI., r. 1 (*e*)." And A. L. Smith J. says: "The terms of the contract are, in the first place, that the charterparty is to be obtained by the seller, but adopted by the buyer, for whom the seller acts for this purpose in the capacity of agent. In the second place, when the ship has been chartered she is to be addressed to the buyer, who is to pay the costs of freight. On the face of the contract, it appears that as soon as these goods are put on board and shipped in Sweden, the transit is complete, and they are at the buyer's risk." However, *Barrow* v. *Myers* (2) does not bind us, and it appears to me to be inconsistent with the various decisions of this Court, which have been cited in argument, and, if it cannot be distinguished, it cannot stand. In the present case, the alleged breach was in Hamburg, where the defendant shipped the wrong sort of aluminium, and this appeal must be allowed, and the issue of the writ and the leave to serve notice of the writ out of the jurisdiction must be discharged.

Appeal allowed.

Solicitor for plaintiffs: *W. B. Styer.*

Solicitors for defendant: *Adler & Perowne.*

(1) 58 L. J. (Q.B.) 519. (2) 4 Times L. R. 441; 52 J. P. 345.

W. J. B.

[IN THE COURT OF APPEAL.]

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1908

March 28; *April* 13.

In re POPE.
Ex parte DICKSEE.

Bankruptcy—Post-nuptial Settlement—Purchaser for valuable Consideration—Refraining from Divorce Proceedings—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

In order to constitute a person a "purchaser" for valuable consideration within the exception mentioned in s. 47 of the Bankruptcy Act, 1883, it is not necessary that either money or physical property should be given; the release of a right, or the compromise of a claim, may be sufficient to constitute a person a "purchaser" within the meaning of that section.

A post-nuptial settlement of his own property executed by a bankrupt within two years of his bankruptcy in favour of his wife and children, in consideration of the wife refraining from taking proceedings against him in the Divorce Court:—

Held by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. dissenting) to be within the exception mentioned in s. 47, and valid against the trustee in bankruptcy.

THE question raised by this appeal was whether a post-nuptial settlement made by a bankrupt, within two years of his bankruptcy, in favour of his wife and children, in consideration of the wife refraining from taking divorce proceedings against her husband, the bankrupt, was made "in favour of a purchaser . . . . and for valuable consideration" within the meaning of s. 47 of the Bankruptcy Act, 1883, so as to be valid against the trustee in bankruptcy.

The facts, so far as material, were as follows:—

On August 4, 1891, E. V. Pope was married to his present wife, the appellant, and there were three children of this marriage.

By a settlement of April, 1906, E. V. Pope "in consideration of natural love and affection" conveyed certain freehold ground rents of his own, producing a gross income of about 290*l.*, to trustees upon trusts for the benefit of his wife and children.

In October, 1907, E. V. Pope was adjudicated a bankrupt, and one Dicksee was appointed trustee of the property of the bankrupt.

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The trustee applied to have the settlement set aside as void under s. 47 of the Bankruptcy Act, 1883. The wife's story of the transaction was that prior to the execution of the settlement E. V. Pope had committed marital offences which entitled her to a decree for dissolution of the marriage, or at all events to a judicial separation; that he had been losing money in betting on horse races, and, in order to guard herself and her children from being brought to ruin, she threatened him with proceedings in the Divorce Division and to obtain a permanent allowance in the nature of alimony and maintenance, but offered, if he would not further misconduct himself and would make for her and the children an adequate provision by settlement, to refrain from taking such proceedings in respect of his then past conduct, with the result that her husband agreed, in consideration of her refraining from taking such proceedings, to make the settlement which was now in question.

The husband accordingly instructed a solicitor to prepare the settlement, but, as nothing was said to him at the time about the arrangement with the wife, the solicitor expressed the consideration to be the "natural love and affection" of the settlor for his wife and children.

Bigham J. said he believed the wife's story, and held that the settlement was valid as against the trustee.

The trustee appealed. The appeal was heard on March 28.

Herbert Reed, K.C., and *F. Mellor*, for the appellant. The words of s. 47 are not confined to "valuable consideration," but they are "purchaser . . . . for valuable consideration." *Ex parte Hillman, In re Pumfrey* (1), which was decided under s. 91 of the Bankruptcy Act, 1869, where the wording is the same, shews that "purchaser" means a "buyer" in the ordinary commercial sense, and a "purchaser" therefore within s. 47 must be some one who gives money, or property or something capable of being measured by money, as a consideration for the settlement; the mere giving up or release of a right to relief in divorce is not sufficient to constitute the wife a "purchaser." The purchaser need not give the full value, and he may purchase

(1) (1879) 10 Ch. D. 622.

for others—*Hance* v. *Harding* (1)—but a mere surrender of rights not capable of being measured by a money equivalent, cannot constitute the surrenderor a purchaser. "Valuable consideration" may have been given, but that is not enough unless the wife can make out that she is a "purchaser" within s. 47. That the trustees are not "purchasers for value" is clear: *In re Parry, Ex parte Salaman.* (2)

The word "purchaser" in this connection was introduced for the first time in s. 91 of the Bankruptcy Act of 1869, the corresponding section to s. 47 of the 1883 Act. The earlier Acts of 1849, s. 126, 1 Jac. 1, c. 15, s. 5, and 6 Geo. 4, c. 16, s. 73, do not contain the word; the language in those acts is "for some valuable consideration." The consideration therefore must now be such that it constitutes the giver a "buyer."

C. A. Russell, K.C., and *Edward Clayton*, for the wife and the trustees of the settlement. No true distinction can be drawn between a "purchaser" for one consideration and a "purchaser" for another consideration. Taking the definition of "purchaser" as given in *Hance* v. *Harding* (1), it is the widest word that can be used for a person who acquires property for a consideration. The wife in this case did give money consideration for this property in settlement; there were the costs, which in any event the husband would have to pay, and there was the right to alimony.

No inference adverse to the wife can be drawn from the introduction of the word "purchaser" into the Acts of 1869 and 1883. "Purchaser" is an apt word for describing any person in whose favour and for valuable consideration any transfer or conveyance is made.

The bona fide compromise of a real claim is a good consideration: *Miles* v. *New Zealand Alford Estate Co.* (3) Taking the facts as found by Bigham J., the wife had a good claim which she released in return for this settlement. It is not necessary that money, or money's worth, should be given, but if a money element is necessary, there are the costs and alimony.

(1) (1888) 20 Q. B. D. 732. (2) [1904] 1 K. B. 129.
(3) (1886) 32 Ch. D. 266.

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Alfred Bucknill, for the infant children.

Reed, K.C., in reply. Alimony is not a debt provable in bankruptcy: *Fitzer* v. *Fitzer*. (1) The decree is only against the person of the husband.

Cur. adv. vult.

April 13. COZENS-HARDY M.R. The question in this appeal is whether a post-nuptial settlement, executed by the bankrupt within two years of his bankruptcy, is avoided by s. 47 of the Bankruptcy Act, 1883. Bigham J. has found as a fact that the settlement was executed in pursuance of a bargain made between the bankrupt and his wife that she would not take proceedings against him in the Divorce Court on the ground of matrimonial misconduct if he would settle the property upon her, and the learned judge held that the case was brought within the exception in s. 47 as being a settlement "in favour of a purchaser or incumbrancer in good faith and for valuable consideration."

No consideration is mentioned on the face of the settlement, but this is not material, for consideration may be proved by parol testimony. Nor is it disputed that there was good faith on the part of the wife, who honestly threatened to take proceedings in the Divorce Court; but it is contended that the settlement was not made "in favour of a purchaser" and "for valuable consideration." I am unable to follow this argument. That there was valuable consideration is plain, having regard to the finding of the judge as to the bargain. It is decided by authority, which binds us, that the word "purchaser" is equivalent to "buyer" in the sense in which that word is used in commercial transactions—*Hance* v. *Harding* (2)—and, on the other hand, that it is something more than a conveyancing term and is not satisfied by a deed, such as an assignment of leaseholds, which might suffice to render the assignee a "purchaser" within the statute of 27 Eliz. c. 4: *Ex parte Hillman, In re Pumfrey*. (3) I think it means a person who has given something in consideration of the settlement, or, to use the language of Sir James Hannen, a quid pro quo. Now in the present case the wife

(1) (1742) 2 Atk. 511. (2) 20 Q. B. D. 732.
(3) 10 Ch. D. 622.

bargained that she would not commence proceedings in the Divorce Court, her costs in which proceedings would have been payable by the husband whatever the result of the proceedings might have been: see rule 158. This was, in truth, a pecuniary payment from which he was relieved. Moreover, these proceedings might have resulted in an order for alimony. I mention these pecuniary elements, although I do not think it possible to overlook the fact that as part of the consideration for this settlement the husband procured his escape from public exposure in the Divorce Court. I am unable to adopt the view that there must be either money or physical property given by the purchaser in order to bring the case within the exception. In my opinion the release of a right or the compromise of a claim, not being a merely colourable right or claim, may suffice to constitute a person a "purchaser" within the meaning of s. 47. I am not pressed by the words "purchaser or incumbrancer," for I think they only mean that the exception is to apply whether the person taking under the settlement, which by s. 3 includes any conveyance or transfer of property, takes the absolute interest or only a mortgage. For these reasons, which are substantially those given by Bigham J., I think the appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I have had an opportunity of reading the judgment which has just been delivered, and I entirely concur in it.

BUCKLEY L.J. The settlement, although not so expressed upon its face, was executed in consideration of the release by the wife of an existing right to relief for matrimonial offences. Bigham J. has found that as a fact. The question is whether such a release (which no doubt is valuable consideration) constituted her a "purchaser" for valuable consideration within s. 47 of the Bankruptcy Act, 1883. It has been decided in this Court that a "purchaser" means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word: *Ex parte Hillman, In re Pumfrey.* (1) But the words "in the ordinary

(1) 10 Ch. D. 622.

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commercial sense" must not be pressed too far. From the decision, also in this Court, in *Hance* v. *Harding* (1) it results, first, that the purchaser need not give the commercial or market value or the contractual value of the property—that it is sufficient that property be given—and, secondly, that the purchaser need not purchase for himself, but may purchase for others. It remains, however, to consider whether the surrender of rights not capable of being measured by pecuniary equivalent, can constitute the surrenderor a purchaser. There is no case, so far as I know, and counsel have not been able to refer to any, in which the point has been decided. A decision that a surrender of such rights constitutes a purchaser for this purpose will obviously be of very far-reaching effect in the law of bankruptcy.

The word "purchaser" is found in this connection for the first time in s. 91 of the Bankruptcy Act, 1869, and is repeated in s. 47 of the Bankruptcy Act, 1883. The earlier statute of 1849, s. 126, did not, nor did the Acts 1 Jac. 1, c. 15, s. 5, and 6 Geo. 4, c. 16, s. 73, contain the word. In those Acts the language was only "for some valuable consideration." Under the present Act the inquiry must be whether the person was (1.) a purchaser and (2.) gave valuable consideration. The language of the section is "purchaser or incumbrancer in good faith and for valuable consideration." The words "in good faith" exclude colourable transactions. The inquiry, therefore, must be whether the transaction, being a real one, is for valuable consideration, and for such valuable consideration as constitutes the giver a purchaser, that is a buyer. The language requires that some persons who give valuable consideration shall be excluded. For, if not, why add to the language of 1849 the word "purchaser," which was not inserted before? And, apart from that consideration, why say "purchaser for valuable consideration" when the words "for valuable consideration" import all that is intended? The person who comes within the section must satisfy two requisites—first, he must give valuable consideration, and, secondly, he must give it as a purchaser. Valuable consideration may consist in the giving of property or in the giving or surrender of something which is not property,

(1) 20 Q. B. D. 732.

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something which is not measured by any pecuniary equivalent. The purchaser for valuable consideration within this section must be, I think, a person who gives such a valuable consideration as justifies his being described as a purchaser or buyer. That is only satisfied when the valuable consideration is money, or property or something capable of being measured by money. It does not, I think, extend to the surrender of such a right as the right to relief for matrimonial offences. For these reasons I think that s. 47 avoids this settlement, and that this appeal ought to be allowed. But, as the majority of the Court are not of my opinion, the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Colyer & Colyer; Beaumont & Son.*

W. C. D.

[IN THE COURT OF APPEAL.]

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McDOUGALL & BONTHRON, LIMITED *v.* LONDON AND INDIA DOCKS COMPANY.

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Ship—Dock Company—Exemption from Dock Rates—Lighter—"Bona fide engaged in discharging or receiving Goods to or from on board of any Ship or Vessel"—Ship or Vessel "lying therein"—London and St. Katharine Docks Act, 1864 (27 & 28 *Vict. c. clxxviii.*), *s.* 136.

By a section of a dock company's Act it was provided that "all lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

A lighter entered one of the company's docks in order to discharge goods into a steamship then lying in the dock, and finished discharging her goods into the steamship at 5 P.M. on Saturday. The steamship left the dock on the next tide, at about midnight on that day; the lighter remained in the dock until the early morning tide on the following Monday, when it left:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the lighter was bona fide engaged until

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her departure in discharging goods to a vessel lying in the dock within the meaning of the above-mentioned section, and that in leaving the dock she was doing an act which was part and parcel of her entering into the dock to discharge her goods into the steamship, and that therefore she was exempt under the section from payment of dock rates.

A lighter was taken into the same dock with the bona fide intention of discharging goods into a steamship then lying in the dock, but the steamship finished loading her cargo without taking on board any of the goods in the lighter, and left the dock two days after the lighter entered. The lighter remained in the dock for four days after her entry, when another steamship entered the dock, and the lighter at once commenced discharging her goods into her and continued until they were all discharged eight days afterwards:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the expression "lying therein" in the above-mentioned section meant any vesssl lying in the dock at the time of the discharge of goods to her from a lighter, and was not confined to the case of a vessel lying in the dock at the time of the entry of the lighter, and that, therefore, a lighter which entered the dock to serve a particular ship already lying in the dock, and, being unsuccessful in doing so, remained in the dock bona fide for the purpose of discharging to or receiving from some other ship, was exempt from dock rates.

Appeals of the defendants from the judgments of Walton J. in two actions tried without a jury.

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The plaintiffs were the owners of a lighter called the *St. Thomas*, and the action was brought to recover the sum of 1*l.* 10*s.* 6*d.* charged by the defendants as dock dues upon the lighter and paid under protest by the plaintiffs to the defendants under the following circumstances. On Friday, November 24, 1905, the *St. Thomas*, which was laden with bales of manila hemp, entered the St. Katharine Dock, which is one of the system of docks owned by the defendants, to discharge the hemp into the steamship *Pladda*, which was at that time lying in the dock. The *St. Thomas* proceeded to discharge her cargo of hemp into the *Pladda*, the operation being completed about 5 P.M. on the following day, Saturday, November 25; the *Pladda* left the dock on the next tide, which was about midnight on that day. The *St. Thomas* did not leave the dock on that tide, but remained in the dock the whole of Sunday, November 26; the plaintiffs

contended that Sunday was not a working day. The *St. Thomas* endeavoured to leave the dock on the early morning tide of Monday, November 27, but her departure was objected to by the defendants, who demanded 1*l.* 10*s.* 6*d.* as dock dues calculated at the rate of 6*d.* per ton on the lighter's tonnage. In order that the *St. Thomas* might leave the dock, the money was paid under protest, and the plaintiffs sought to recover it in the present action.

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The plaintiffs were the owners of the lighter *Jew*, and sought to recover 19*s.* paid by them under protest as dock dues on the lighter. On Thursday, November 23, the *Jew*, which carried a full cargo, entered the Royal Albert Dock, which is also owned by the defendants, to discharge her cargo into the steamship *Matiana*, at that time lying in the dock. The loading of the *Matiana* was completed about noon on Saturday, November 25, but, owing to want of space, she did not take any of the cargo of the *Jew*. The *Matiana* left the dock on the same day, but the *Jew* remained lying in the dock and made no attempt to leave. On Monday, November 27, the steamship *Somali* entered the dock, and the *Jew* went to the *Somali* and began at once to discharge her cargo into her. On the following day, November 28, payment of dues amounting to 19*s.* at 6*d.* per ton of the tonnage of the *Jew* was demanded by the defendants, but the money was not paid. The *Jew* did not complete the discharge of her cargo into the *Somali* until December 5, and then, being empty, she went alongside the steamship *Rappahannock*, which was lying in the dock, and began to receive timber from her. On December 10 the *Rappahannock* left the dock, and the steamship *Maryland* came in, and the *Jew* went alongside the *Maryland* to take in more cargo. On December 20 the *Jew*, having finished taking in cargo from the *Maryland*, left the dock, the plaintiffs having first paid under protest the sum of 19*s.* which had been demanded by the defendants on November 28; this sum the plaintiffs now sought to recover.

At the trial Walton J. held that the defendants were in neither

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case justified by the provisions of their private Acts (1) in demanding the dock dues, and in each action he gave judgment for the plaintiffs. The defendants appealed.

(1) The material provisions of the private Acts of the defendants are as follows:—

By the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), the London Dock Company and the St. Katharine Dock Company were amalgamated, and s. 132 provides that "The amalgamated company from time to time may demand and take in respect of every vessel for entering into any of their docks, basins, cuts, locks, or entrances, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the amalgamated company from time to time appoint."

By s. 133: "Provided that the tonnage rate which the company from time to time may demand and take in respect of any lighter, barge, or other like craft shall not exceed the rate or sum which from time to time is charged in respect of vessels trading coastwise between the Port of London and any port or place in the United Kingdom."

By s. 134: "The amalgamated company may take or receive for every article of goods, wares, or merchandise brought into or landed or deposited within, or delivered or shipped from, the docks and works, such reasonable rates, rents, or sums as the amalgamated company from time to time appoint. . . . ."

By s. 136: "All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

The East and West India Dock Company's Extension Act, 1882 (45 & 46 Vict. c. xc.), authorized the construction of a new dock at Tilbury, and provided as follows:—

Sect. 25: "The company may from time to time demand and take in respect of every vessel for entering their new dock, lock, or tidal basin, or for lying therein or departing therefrom respectively, exclusively of the charge for loading or unloading, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the directors shall from time to time appoint, not exceeding the dock tonnage rates, rents or sums specified in Part I. of the schedule to this Act. . . . ."

Sect. 26: "The tonnage rate which the company may from time to time demand and take in respect of any lighter, barge, or other like craft entering their new dock, lock, or tidal basin, and for lying therein, shall not exceed the rate, rent, or sum which from time to time is charged by them in respect of vessels trading coastwise between the Port of London and any port or place in the United Kingdom: Provided always that any lighter, barge, or other like craft entering the new dock, lock, or tidal basin to discharge or receive ballast or goods to or from on board of any vessel lying therein,

Sir R. B. Finlay, K.C., and *J. A. Hamilton, K.C.* (*George Wallace* with them), for the defendants. The exemption from dock dues under s. 136 of the London and St. Katharine Docks Act, 1864, only applies to lighters entering the dock for the purpose of discharging or receiving goods or ballast into or from a vessel lying in the dock; in the natural meaning of the words that must mean a vessel lying in the dock at the time when the lighter enters. To construe the words as meaning a vessel lying in the dock at the time when the discharging or receiving takes place would make them mere surplusage, for, of necessity, the vessel must be so lying. The words were inserted for the purpose of excluding from the exemption lighters entering the dock on speculation or in expectation of some vessel not yet arrived. Unless some such limitation were imposed, there would be no limit to the time previous to the arrival of a ship during which a lighter might wait in the dock for a ship into or from which she might discharge or receive goods, being all the while exempt from dock charges. A contrary interpretation would be very prejudicial to the defendants, whose dock space might be crowded with lighters waiting on speculation, while the defendants themselves received no remuneration in respect of the space so occupied.

By s. 132 of the Act of 1864 the dock company are enabled to demand and take in respect of every vessel for entering into

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shall be exempt from the payment of any rate, rent, or sum, so long as such lighter, barge, or other like craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid: Provided, also, that all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

The London and St. Katharine and East and West India Docks Act, 1888 (51 & 52 Vict. c. cxliii.), authorized a working union of the dock companies, and by s. 57 it provided that "The rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London Company, and for lying therein and for departing therefrom respectively, shall not exceed the rates specified in Part I. of the schedule to the East and West India Dock Company's Extension Act, 1882, and s. 25 of the last-mentioned Act shall extend and apply not only to and in the case of the docks authorized by that Act, but to and in respect of all the docks and basins of the East and West India Company."

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any of their docks, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the company may appoint, and s. 3 of the same Act incorporates the Harbours, Docks, and Piers Clauses Act, 1847, which defines "vessel" so as to include lighters. Under those provisions the company may appoint a separate charge for entering, for lying in, and for departing from the dock, or they may appoint lump sum rates to cover all three, or they may couple together any two of these matters.

The plaintiffs cannot successfully contend that under s. 136 both the *St. Thomas* and the *Jew* were exempt from dock rates on the ground that while in the dock they were bona fide engaged in discharging goods into vessels. The *St. Thomas* would, no doubt, have been exempt under that section from any charge for lying in the dock or departing, if she had left by the next available tide after discharging her cargo into the *Pladda*. But she was not bona fide engaged in discharging goods into a vessel lying in the dock during the interval between that tide and the time when she actually went out; she was then lying in the dock for her own convenience. In *London and India Docks Co.* v. *Union Lighterage Co.* (1) the Divisional Court held that a lighter did not lose the privilege of exemption because of unnecessary delay in leaving the dock after discharging; but that was on the ground that the company had made no rate for lying in the dock or departing from it, and there the dock company had to contend that by the delay the lighter was deprived of the privilege which undoubtedly attached to her at the time of entry. In the present case, as a rate for lying in the dock and a departure rate have been appointed by the company, the same considerations do not apply. The status of exemption only lasts so long as the lighter is bona fide engaged in effecting the purpose in respect of which the exemption was conferred; when she becomes engaged in effecting another purpose the exemption is at an end, and the dock company becomes entitled to charge both in respect of her continuance in the dock and her departure therefrom. The judgments in *London and India Docks*

(1) Unreported.

Co. v. *Thames Steam Tug and Lighterage Co.* (1) support the defendants' contention in the present case. In that case the lighters did not ultimately discharge any goods at all, but all the time they were in the dock they were trying to effect that purpose, and directly they failed in doing so they left the dock.

As regards the case of the *Jew*, she, no doubt, was exempt as far as entering the dock was concerned, because she entered to discharge goods into the *Matiana*, which was then lying in the dock. On the construction of s. 136 previously mentioned, as soon as it became impossible for her to discharge goods into the *Matiana* and she went to discharge goods into the *Somali*, which was not lying in the dock when she entered, she lost her status of exemption and became liable to a charge for continuance in and departure from the dock. The charges made are reasonable, and such as the dock company were entitled to make under their Acts.

Scrutton, K.C., and *Cranstoun*, for the plaintiffs. In construing the exemption clauses in respect of lighters regard must be had to the circumstances existing at the time of the passing of the Acts by virtue of which the defendants' docks were originally brought into existence and had a monopoly conferred upon them. Vessels had previously been loaded and discharged in the river, and lighters had free access to them for the purpose of loading and unloading without any payment, and could take such time about it as might be convenient according to exigencies of navigation. The rule of construction of clauses in a private Act, by which a right is given to levy charges on the public and an exemption under certain circumstances from such charges is conferred, is laid down in *Stourbridge Canal Co.* v. *Wheeley* (2) and *Stockton and Darlington Ry. Co.* v. *Barrett* (3) as being that the terms of the statute must be regarded as a bargain between the undertakers and the public, and both the charging clause and the exemption clause must, if ambiguous, be construed in favour of the public. In the case of the *St. Thomas* it is obvious that the exemption under s. 136 must, in the case of a ship which, on entry and while in the dock, was exempt, cover

(1) [1908] 1 K. B. 786. (2) (1831) 2 B. & Ad. 792.
(3) (1844) 11 Cl. & F. 590.

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her departure from the dock within a reasonable time; and it is contended that it was reasonable for her to wait until the Monday morning tide. The evidence shews that Sunday was not a working day in the Port of London, but, assuming that it was, it being reasonable for her to wait until the Monday morning tide, she must be regarded as, until that tide, still being bona fide engaged in the purpose of discharging goods to a ship lying in the dock.

As to the *Jew*, it is submitted that the construction of s. 136 for which the appellants contend is wrong. The words "ship or vessel lying therein" do not necessarily mean a ship or vessel lying in the dock when the lighter enters; the words are satisfied by construing them as meaning "ship or vessel lying therein at the time of the discharge or receipt of goods by the lighter"; and that is the more reasonable construction. It would have been absurd that the *Jew* should have been compelled to leave the dock and to come in again to discharge her cargo into the *Somali*, which would have given the dock company the trouble of locking the lighter out and locking it in again without remuneration to the company. It is unnecessary to consider at length the case of a lighter which merely comes into the dock on speculation in the hope of discharging or receiving goods into or from some ship; possibly she would not be bona fide engaged in discharging or receiving goods into or from a ship within the meaning of s. 136; but that is not the present case.

Further, the defendants had no power to charge anything but an entrance rate in respect of a lighter; they cannot make a separate charge for lying in or departing from the dock. By the East and West India Dock Company's Extension Act, 1882 (45 & 46 Vict. c. xc.), s. 25, provision is made for the charging of rates by the dock company in respect of every vessel for entering the new dock to be made under that Act, or for lying therein or departing therefrom; and s. 26 provides that the rate which the company may demand in respect of any lighter, barge, or other like craft entering the new dock and for lying therein shall not exceed the rate charged by them in respect of vessels trading coastwise between the Port of London and any port or place in the United Kingdom. That Act distinguishes between "vessels"

and "lighters," and, therefore, rates can no longer be charged by the defendants in respect of lighters otherwise than under that Act. By s. 57 of the London and St. Katharine and East and West India Docks Act, 1888 (51 & 52 Vict. c. cxliii.), which was an Act to authorize a working union of the dock companies, it is provided that the rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London Company, and lying therein and departing therefrom respectively, shall not exceed the rates specified in Part I. of the schedule to the East and West India Dock Company's Extension Act, 1882, and that s. 25 of the last-mentioned Act shall extend and apply not only to and in the case of the docks authorized by that Act, but to and in respect of all the docks and basins of the East and West India Company. The effect of that legislation is that, so far as lighters are concerned, the power of charging rates in respect of lighters is confined to such rates as may be charged under the Act of 1882. Part I. of the schedule to that Act, which is headed "Dock Tonnage Rates," only specifies rates for vessels entering to load or discharge cargo; therefore no rates can be charged in respect of a lighter for anything but entering the docks. But, assuming that the defendants have power to charge lighters with rates for departure from the dock, those rates must not be in excess of those charged on vessels trading coastwise, and by s. 132 of the Act of 1864 they must be reasonable. The rates in respect of lighters which the defendants are seeking to charge in this case are in excess of those charged in the case of vessels trading coastwise, and are not reasonable. The defendants have no power under their Acts to make the regulations which they made by their rates coming into force on November 1, 1905, with regard to lighters leaving the dock by the first available tide after completing the discharge or receipt of goods, for, assuming that a lighter which departs within a reasonable time after completing the discharge or receipt of goods is still within the exemption given by s. 136, such a regulation violates the provisions of the Act. The sum of 6*d.* per ton register which the defendants charge by their rates for a lighter lying in the dock for

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any period not exceeding one week from the tide next following the completion of the discharge or receipt of goods and for departing therefrom is in excess of that charged to vessels trading coastwise, which are charged 6*d.* for entering the dock and lying therein for two weeks. Again, by the schedule to the Act of 1882 the rent for lying in the dock, to commence from date of entrance or at such time thereafter as may be from time to time fixed by the company, must not exceed 2*d.* per ton per week. The evidence shewed that Sunday was not a working day in the Port of London. [They cited *Scottish Drainage and Improvement Co.* v. *Campbell* (1); *Allnutt* v. *Inglis* (2); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (3); *Pryce* v. *Monmouthshire Canal and Ry. Cos.* (4)]

Sir R. B. Finlay, K.C., in reply. The case comes back to the construction of s. 136 of the Act of 1864, upon which little light is thrown by general statements in previous cases as to the construction of taxing Acts. In the present case the section which has to be construed is an exemption section, and not a charging section, and it is for the parties claiming exemption to bring themselves within it. In *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (5) the section there under consideration was clearly treated as requiring as a condition of exemption that the lighter should have entered to discharge or receive goods into or from a particular ship then lying in the dock.

[BUCKLEY L.J. The contention raised in this case as to the meaning of the section was not before us in that case.]

The section deals, first, with the question how the exemption is to be acquired—that is, by entering to discharge or receive goods into or from a vessel lying in a dock—and, secondly, with the question how long the exemption is to be retained. It is to be retained as long as the lighter is bona fide engaged in the business on which she came in, that is, discharging or receiving goods into or from the particular ship. As soon as she engages in another purpose, or if she unnecessarily delays after completing

(1) (1889) 14 App. Cas. 139, at p. 142.
(2) (1810) 12 East, 527.
(3) [1892] 3 Ch. 242.
(4) (1879) 4 App. Cas. 197.
(5) [1908] 1 K. B. 786.

her original purpose, she ceases to be within the exemption. The defendants ask the Court to review the case of *London and India Docks Co.* v. *Union Lighterage Co.* (1), in which the Divisional Court held that a lighter did not lose the exemption by remaining in the dock too long; the exemption exists only so long as she is bona fide engaged in discharging or receiving.

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Cur. adv. vult.

July 31. VAUGHAN WILLIAMS L.J. read the following judgment:—In the case of the lighter *St. Thomas*, which on the morning of November 24, 1905, entered the St. Katharine's Dock with a cargo for the steamship *Pladda*, which was lying in the dock, she had by 5 P.M. on Saturday, November 25, discharged her cargo into the *Pladda*. The *Pladda* left on the next tide, which was about midnight of November 25; but the *St. Thomas* lay in the dock throughout Sunday, November 26, her owners alleging that Sunday was a non-working day. On Monday, November 27, the *St. Thomas* attempted to leave the dock on the early morning tide, but was stopped by the defendants, who demanded 1*l.* 10*s.* 6*d.* as dues. The 1*l.* 10*s.* 6*d.* was paid under protest, and this action is brought to recover back the money so paid.

There is no question but that the *St. Thomas* was an exempt barge within the meaning of the London and St. Katharine Docks Act, 1864, that is, exempt from any rate or charge whatever so long as she was bona fide engaged in discharging or receiving ballast or goods to or from on board any ship or vessel lying in the docks; and this Court held recently that these words applied not only to the time during which the barge or lighter was engaged in the physical act of discharging or receiving goods or ballast into a vessel lying in the dock, but also to the time during which she was going to the ship to lie alongside or returning from the ship for the purpose of departure from the dock. The *St. Thomas*, in my judgment, when she left the dock on Monday, November 27, was doing an act which was part and parcel of her entry into the dock to discharge goods into the *Pladda*.

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The question that we have to decide in this case arises from the fact that the *St. Thomas* did not leave the dock on the next available tide after the *Pladda* left, but lay in the dock throughout Sunday, November 26, her owners alleging that Sunday was a non-working day. Walton J. has decided that Sunday was a working day, and that, however prudent it may have been from the point of view of the master of the *St. Thomas* for him not to depart from the dock during the only two or three hours before midnight during which a barge of her draught could leave the dock, having regard to the fact that the barge was a barge propelled by oars only, bound down the river Thames, and could therefore proceed only on an ebb tide, and however reasonable it might be from his point of view for him to keep the barge within the dock for the Sunday, which day Walton J. refused to find to be a "non-working day," yet it was not reasonable that the barge should have the convenience of lying in the dock for Sunday without the obligation to pay the dock company for affording the barge that convenience, and Walton J. would have found in favour of the dock company had it not been that he arrived at the conclusion that the rate charged by the dock company when they obtained payment of the 1*l.* 10*s.* 6*d.* from the master of the barge was a rate which the master was not liable to pay—in other words, was a bad rate. He begins by referring to the case of *London and India Docks Co.* v. *Union Lighterage Co.* (1), before Lord Alverstone C.J., Kennedy and Ridley JJ.—a copy of the shorthand writer's note of the judgment has been supplied to us—in which it was decided that, where a lighter has come into a dock with cargo for a steamer lying in dock or to receive cargo from a vessel lying in dock, and the lighter remains in the dock for a longer time than is reasonably necessary, the dock company cannot make a charge in respect of such unreasonable delay unless they have made some rate fixing the amount to be paid, and then Walton J. goes on to consider whether the rate charged in this case is a bad rate and comes to the conclusion that the rate charged is a bad rate.

Before discussing the grounds on which Walton J. arrived at this conclusion, I feel bound to say that I am not satisfied that

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an exempt lighter can be charged for unreasonable delay so long as she is bona fide engaged in discharging or receiving goods or ballast to or from a ship lying in the dock, and I doubt whether the dock company can charge any rate so long as the delay is a delay which is not inconsistent with the barge being bona fide so engaged. Surely, if there is any work to be done by those in charge of the lighter in the physical act of receiving or discharging from or to the vessel, the exempt vessel could not be charged a rate for lying in dock unless the receiving or discharging were so conducted as to negative the lighter being bona fide engaged in receiving or discharging from or to a vessel lying in the docks. So I think in a case of delay in departure no rate can be charged unless the delay negatives the lighter being bona fide engaged in such loading or discharging. I think, therefore, one must test reasonableness from the point of view of the master of the craft which in order to be exempt has to be bona fide engaged. In my judgment the *St. Thomas* was bona fide engaged in such work both when she did not depart during the two or three hours before the midnight high tide and also during Sunday.

The ground on which Walton J. decides that the rate is a bad rate is this. He says: "The dock company have a right to make a rate for the time during which the lighter remains in dock beyond the time that is reasonably necessary for discharging or receiving the goods; but if the lighter is an exempt lighter and does remain longer than is necessary, I do not think that that entitles the dock company to impose a rate upon that lighter for departing from the dock. The dock company may impose these charges, as I have said, for entering, lying in the dock, and departing therefrom; but if the lighter is an exempt lighter, it certainly is exempt in respect of entering, and I think it is exempt in respect of departing, and it is exempt in respect of lying in the dock, so long as it does not lie longer than is reasonably necessary for the purpose of discharging or receiving cargo, and, therefore, if by this rate the dock company imposed a charge upon this lighter, which was an exempt lighter, for departing from the dock, then I think it is a bad rate. If it were treated as a charge merely for the time occupied beyond what was reasonably necessary, as a charge for lying in the dock, then I

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think that it is a bad rate, because if it is good, it must be good within the terms of s. 25 of the Act of 1882 and Part I. of the schedule. Part I. of the schedule which gives the maximum rate is this: 'Vessels entering to load or discharge cargo, 1*s.* 6*d.* per ton register.' This lighter was exempt for entering. Then rent, and this is the only rate for rent which is given in the schedule: 'Rent to commence from date of entrance, or at such time thereafter as may be from time to time fixed by the company, 2*d.* per week per ton register.' I am of opinion that for lying in the dock longer than is necessary the dock company cannot charge more than 2*d.* Therefore I think this rate is bad." I agree with this reasoning and conclusion of Walton J.

Taking the view which I do, it is not necessary for me to decide the question as to whether Sunday is a "dies non," but I do not wish it to be supposed that I differ from Walton J. except so far as I have expressly done so.

I will now deal with the case of the *Jew*. The *Jew* went into the Royal Albert Dock on November 23, 1905, in the morning, with goods for a steamer called the *Matiana*. The *Matiana* finished her loading on Saturday, the 25th, about noon. The *Matiana* left the dock without taking the goods which had been brought for her on board the *Jew*; they were shut out. The *Jew* did not leave the dock; she remained in the dock, just as the *St. Thomas* remained in, through Sunday and until Monday morning. On Monday morning, the 27th, the lighter was ordered not to leave the dock, but to transfer her cargo to the steamship *Somali*, which was expected, and which arrived in dock about noon on Monday. The *Jew* thereupon went to the *Somali* to put the goods which she had on board the *Somali*. The payment in question which the plaintiffs are seeking to recover back was demanded on the 28th, and was subsequently paid under protest. So far the case of the *Jew* is the same as the case of the *St. Thomas*, except that the *St. Thomas* discharged her cargo into the *Pladda* in accordance with the intention with which she entered the dock, whereas the *Jew* did not load the *Matiana*, as she had intended when she entered the dock, but loaded the *Somali*, a ship which was not lying in the dock when the *Jew* entered the dock. Walton J. has held that the dock company cannot charge in

respect of November 23, 24, or 25. He says, and I think rightly, that his decision follows from the decision of Kennedy and A. T. Lawrence JJ. in *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (1) I agree that the effect of that case is that the lighter does not lose its privilege because the cargo which is brought in for some vessel is shut out.

The contention urged before us on behalf of the dock company has been that, according to the true construction of s. 136, the words "lying therein" mean lying therein at the time of the entry of the lighter entering into the docks, and that, as the *Somali* was not lying therein at the time of the entry of the *Jew* into the dock, the exemption which arose for the purpose that the *Jew* should discharge goods into the *Matiana* is not available, since she proceeded to discharge into a vessel, the *Somali*, which was not lying in the dock when she entered. Now the words of s. 136 are these: "All lighters and craft entering into the docks, basins, locks or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever." In my judgment the words "lying therein" mean lying therein at the time of the discharge of the goods from the lighter into any ship or vessel lying therein, and do not mean at the time of the entry of the lighter into the dock. It is urged that upon that construction the words "lying therein" are surplusage and useless, since the lighter which entered the dock could not discharge into or receive from a vessel unless the vessel were in the dock. My answer is that the words are not meaningless, for they describe that which is the truth, and that, if the construction contended for was intended, the words "*a* ship or vessel" would have been more natural than "any ship or vessel." Moreover, it seems to me that, if the Legislature intended that the barge or lighter entering the dock should only be exempt if it was going to render a service to a ship or vessel

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lying in the dock at the time when the lighter entered therein, it would have been very easy to say so plainly.

In my judgment, in a case like this, in which it is sought to throw upon lightermen, who at one time were entitled to free water in the docks, a tax on entering a dock unless they were entering to load a particular ship lying in the dock at the time of entry, the dock company must point to plain words, and if the words are ambiguous the dock company cannot enforce such a tax. Moreover, if a barge loses its exemption if she renders a service to a vessel which was not in the dock when the barge entered, it would seem that the goods would be liable to a rate which is inconsistent with the concluding sentence in s. 136 itself. I think that the observation of Lord Brougham in *Stockton Ry. Co.* v. *Barrett* (1), that "in dubio you are always to lean against the construction which imposes a burden on the subject," applies in this case and is not excluded by the principle of construction enunciated by Lord Cairns in *Pryce* v. *Monmouthshire Canal and Ry. Cos.* (2) The present exemption section is not one which moderates and limits a right to payment for services rendered which might otherwise exist. It is really an exemption introduced for the purpose of excepting from the rating power of the dock company the right of free water which belonged to lighters before the dock Acts were passed, and really is a qualification of a pre-existing right of the subject.

I have only to add that, having looked at the ships' entry book and the craft book, I do not find that in the craft book there is ever mentioned the name of the ship into which or from which the lighter is going to discharge or receive goods or ballast. This does not look as if the dock company have in practice acted on the construction now put forward by them. It was urged that, if the exemption applies to lighters going in which render service to a ship not lying in the dock at the time of the entry of the lighter into the dock, the result would be that lighters might enter to ply for engagements. We have not to decide this question, but I do not shrink from the idea that this result may have been contemplated by the Legislature. It is for the benefit of the public and of ships coming to the docks that

(1) 11 Cl. & F. 590, at p. 607. (2) 4 App. Cas. 197, at p. 202.

lighters should be ready to render services. I think this appeal should be dismissed with costs.

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FLETCHER MOULTON L.J. These actions are brought nominally for the recovery of trifling sums of money, but their real object is to obtain the interpretation by the Court of the powers of the dock company to make certain charges, and they have, I think, adequately raised questions of law which are of importance to the mercantile community. Both cases are concerned with the charges which the defendants are entitled to make on lighters which enter their docks and load or unload ships lying therein, ships which do not, or the consignees of goods on which ships do not, choose to avail themselves of the method of overside delivery on to the quay. We have only to deal with the St. Katharine Dock, a fact which it is important to remember, because the rates in question are statutory rates, and, although the assimilation of the statutes relating to the various docks on the river Thames has been proceeding for many years, it is not yet complete, and these particular docks are not regulated by the same statutes as other docks. In the first instance, therefore, I propose to examine the clauses of the various statutes which give power to the dock company to impose rates on lighters.

Those powers commenced with, and are based upon, certain clauses in the London and St. Katharine Docks Act, 1864, the history of which Act is not wholly unimportant. Going back to the years before the passing of that Act, which was in the main a consolidating Act, but also effected some important changes, we find that various docks had been started by different companies, each with its own private Act, and that a process of coalescence or combination had been going on, so that the docks had grouped themselves by an amalgamating Act, the terms of which to some extent followed those of the prior Acts under which the docks had originally been created. The Act relating to the St. Katharine Docks had corresponding clauses, but not in identical terms, and it is clear that the language of these clauses was settled with great care in order to express with exactness the powers of charging and the exemptions from those powers. As a rule I dislike looking at the provisions of previous statutes in

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order to construe one which is in force; it seems to me to be a somewhat dangerous course to adopt, though the previous Acts may, and in the present case do, throw light on the circumstances under which the Act under consideration was passed.

The fundamental clause regulating the power of charging is s. 132 of the Act of 1864, which runs thus: "The amalgamated company from time to time may demand and take in respect of every vessel for entering into any of their docks, basins, cuts, locks, or entrances, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the amalgamated company from time to time appoint." The sole limit of charging, therefore, so far as that section is concerned, is that the charge must be reasonable. The first question we have to consider, therefore, is the meaning of "vessel" in that section, and we have to turn to the interpretation clauses, which are s. 4 and s. 5 of the Act, and we find in s. 4 the not unusual provision that "the several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned have in this Act the same respective meanings, unless excluded by the subject or context." Then turning to s. 3, to see what Acts are incorporated with the Act of 1864, we find that the Harbours, Docks, and Piers Act, 1847, defines "vessel" in terms sufficiently wide to include craft of all kinds, including lighters; the word therefore includes lighters, unless there is something in the context to exclude them. If we then turn to the charging clause, we see that, so far from the context excluding this meaning of the word "vessel," it specifically includes it in all its width, for s. 133, which is really a proviso on s. 132, runs: "Provided that the tonnage rate which the company from time to time may demand and take in respect of any lighter, barge, or other like craft shall not exceed the rate or sum which from time to time is charged in respect of vessels trading coastwise between the Port of London and any port or place in the United Kingdom." This proviso shews that the power of charging extended to lighters, because the charge made under s. 132 is not to exceed, in the case of lighters, the charge made on coastwise vessels. Clearly, therefore, under s. 132 and

s. 133 there is a power of charging lighters up to the rates charged on coastwise vessels, and the latter rates are in their turn restricted to such as are reasonable.

With respect to lighters, there is another clause of prime importance, s. 136, which says: "All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever." Beyond question, looking both to the language of the section itself and also to the history of the subject-matter, this exemption was introduced in favour of those who worked lighters on the Thames, and who, before the construction of the docks, had assisted in loading or unloading vessels as they lay in the river. In the previous Acts relating to the St. Katharine Docks we find sections which are of like intention though different in language. In 6 Geo. 4, c. cv., the Act under which the St. Katharine Docks were constructed, we find it provided in s. 116 that "all lighters and craft entering into the said docks, basins, or cuts to discharge or receive ballast or goods to or from on board any ship or vessel shall be exempted from the payment of any rate; and also all such ballast or goods so discharged or received shall be exempt from any rate, dues, or charge whatsoever." In this, the earlier section, therefore, the not unimportant words "lying therein" were absent. Shortly after that, I find that in the legislation relating to other docks, which also had certain peculiarly expressed clauses in their earlier Acts, this section appeared as early as in an Act of 1831, and has been adhered to ever since. I therefore approach the consideration of this section with the feeling that its language was carefully chosen, and that its language is not merely the repetition of phraseology consecrated by long usage, but is used de novo with respect to this particular dock to express the future rights of the parties. What then is the meaning of this section? For my own part, I cannot regard it as in any way doubtful. It says, "All lighters and craft entering into the docks, basins, locks, or cuts to

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discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt." Those words describe the qualification which a lighter must have at the moment of entry in order to justify its being allowed to enter free. Sects. 132 and 133 give specific power to the dock companies to charge vessels (including in that term lighters) for entering, and an exemption entitling them to pass without charge must depend on the qualification which they then possessed; it must depend on the words I have just read, the whole of which words must be taken as part of its description. That being so, the lighter at the moment of entry must be a lighter "entering to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein," and in order to satisfy the qualification the ship must be a ship then lying therein; otherwise the words "lying therein" would be absolute surplusage. I think it is not unjustifiable to point out that, although words used in a previous section might be dropped out as being surplusage, I cannot think that they would be introduced in this way for no purpose whatever, and the history of these Acts leads me to give a substantial meaning to them. But I do not rely upon that. I think that we ought to place a meaning upon those words so as to account for their presence in the section, if we can do so fairly and without straining the meaning of the language; and so far from straining their meaning, I think that the meaning I suggest is their natural signification. Moreover, if we read the following words, they seem to point still more clearly to the view that, in order to claim the exemption, the lighter must be going to a specific vessel; they run thus: "so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods." These words point to specific ballast and specific goods, that is, ballast taken to or out of a specific vessel, and similarly in regard to goods. In my opinion, therefore, the exemption applies to lighters going to take goods to, or receive goods from, a specific vessel, she being at the time when the exemption is claimed a vessel "lying therein." The last clause must, I think, have been inserted ex abundanti cautela, for I cannot find any charges on goods delivered into lighters; but it supports my interpretation, for it says, "All the ballast or goods so

discharged or received shall be exempt from any rate or charge whatever."

Let us consider for a moment the rival interpretations. The dock company say that if a lighter is coming in to serve a vessel then in the docks its entry is exempt, and the goods or ballast taken to or from the vessel are also exempt. The other interpretation is that the lighter may go into the dock for the purpose of staying there on the chance or in the hope of getting ballast or goods from some vessel which may at some time come in. If reasonableness is to guide us in the interpretation of statutes, the interpretation suggested by the dock company appears to be by far the more reasonable. It prevents what, in my opinion, must in practical working be a most serious danger to the dock company and to the mercantile public from a too wide exemption in favour of lighters. It prevents lighters from loitering in the docks and filling up the space and interfering with the movements of the ships in the docks. Comparison may be made with the privilege granted to porters of going on to a pier to take or receive the luggage of passengers. It would make all the difference in the convenience of working whether the privilege were given to porters bringing with them, or coming to get, the luggage of a specific passenger, or whether the privilege were a general one to all such persons to place themselves on the pier in the hope of getting a job. If it were left doubtful which of the two interpretations was the correct one, I think the Legislature would feel that it was its business to limit the interpretation to the more reasonable one, and this object would have been adequately performed by the use of the language which we find in s. 136.

Those are the sections upon which are founded the powers of the dock company to charge rates on lighters, and they have only been modified, so far as I can discover, by two subsequent statutes. The first of these is the Act of 1888; but before discussing that Act I must mention one intermediate event, which is explanatory of the section to which I am about to refer. In 1882 the East and West India Docks Company were desirous of building docks at Tilbury, to save large vessels the trouble of coming farther up the river, and the East and West India Dock

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Company's Extension Act, 1882, was passed to authorize them to do so. By s. 25 a limitation was placed on the charges which might be demanded from vessels for entering, lying in, or departing from that dock, and this was expressed in the First Schedule. It applied only to the Tilbury dock, and would, therefore, be immaterial to the present case but for subsequent legislation. In 1888, however, there was an amalgamation, which was called a "working union," between the London and St. Katharine Docks Company and the East and West India Docks Company, the two great groups of London docks. The Legislature had naturally the right to impose terms as a condition of permitting the amalgamation, which might have important effects on the mercantile community. One of the most important of these terms is to be found in s. 57 of the Act of 1888, which, so far as it relates to the St. Katharine Docks, reads thus: "The rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London Company, and for lying therein and for departing therefrom respectively, shall not exceed the rates specified in Part I. of the schedule to the East and West India Dock Company's Extension Act, 1882," that is, the Act for making the Tilbury docks. Therefore the fundamental charging sections in the Act of 1864, which require the charges to be reasonable but otherwise put no restriction on them, are now modified by the absolute restriction of the charges to the amounts that appear in the schedule to the Tilbury Docks Act.

I have now exhausted the statutory powers of imposing a toll or charge upon lighters, but I have not exhausted the legislative provisions bearing upon the clauses which we have to interpret. The last section to which I wish to refer throws a very strong light upon the interpretation of the sections which give the statutory power of imposing tolls; it is s. 16, sub-s. 10, of the London and India Docks Company (Various Powers) Act, 1902 (2 Edw. 7, c. ccxliii.). Between 1889 and 1902 another step had been taken in the process of consolidation of the London docks. By the Act of 1888 a working union has been created between the London and St. Katharine Docks and the East and West India Docks which in 1900 became amalgamation; the Act of 1902

gave various powers to the amalgamated undertaking. Sub-s. 10 reads thus: "The person in charge of any craft entering the dock shall before leaving the entrance lock truly state in writing to the dockmaster the name of the ship, quay, berth, or place in the dock for which such craft is bound, and give all other information that may reasonably be required by the company as to the business in respect of which such craft is so entering the dock, in default whereof such person shall be liable to a penalty not exceeding 5*l.* for each offence, and the dockmaster may refuse to allow such craft to enter the dock, or may remove or moor and detain the same therein in such position as he may think fit, or may remove the same beyond the prescribed limits, and the reasonable charge for such mooring, detention, and removal shall be recoverable in a Court of summary jurisdiction by the company as a civil debt from the owner of such craft." That is not a clause varying the statutory powers of toll; if it were, I should hesitate to use it to interpret a previous statute; it is a section providing the machinery for working the existing powers of toll, and may therefore throw great light on the question of what the Legislature considered to be the existing powers. In my opinion it puts the strongest emphasis on the necessity of the entering lighter being at the time of entry bound for a specific ship or a specific place in the dock. I am dealing with the case of a barge claiming the right of entry because it is taking cargo to, or going to receive cargo from, a ship, and when I find that, in order to provide a machinery which shall render the powers effective, the dock company can compel the barge owner to give the name of the ship, and in default can refuse to allow it to enter, it is strong evidence that the right of entry depended on the barge owner giving the name of the specific ship he was going to serve. So much for the statutory powers.

Before considering whether the charges made by the defendants come within their statutory powers, it is necessary to look at the dock rates as published by them, for there is no doubt that a dock company must duly make a rate and publish it to the public before it can impose it on vessels using the docks. The rates in question are comprised in a list of rates on shipping, dated October 17, 1905, of which the dues and rent on shipping

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of the second and third classes are the only ones relevant to the present case. Those on the second class relate to vessels coming from or loading to European ports, and I only refer to them because it is evident that in the case of sea-going vessels the provision for charging them either for entry or for departure, or for both, might be of considerable importance. It does not follow that in the case of sea-going vessels the rate charged on entry would be the same as that charged on departure, and, therefore, it would be important to the dock company to be able to charge for entering, lying in, and departing respectively. It might be of less importance in the case of vessels that were not sea-going, but nevertheless one realizes that entry and departure are not to be regarded as if they were necessarily one operation and charged for in one toll. Next come the dues on "vessels trading coastwise and lighters." It is obvious from the way in which these dues appear in the book, and from the language used and the interpretation placed upon it by the dock company, that, as carried out in practice, there must be a specific vessel for which the lighter comes into the dock, although the dock company have made the concession that, if the lighter comes in for a specific vessel which arrives not more than one tide after the entry of the lighter, they will treat it as though the lighter had come in for a specific vessel lying in the dock at the time of her entry. Under this heading of "vessels trading coastwise and lighters" there is a provision that the rates are to apply only to cases where "the lighter shall have departed from the dock by the first available tide after the completion of the receipt or delivery of the goods from or at the quay, berth, or place so named," and as the defendants are only charging half their maximum rate, they are, in my opinion, perfectly entitled to make such a reasonable requirement.

Then come the dues on "lighters with or for ballast or goods for or from a ship or vessel and entering the dock earlier than one tide before the arrival within such dock of such ship or vessel." Under this head there is a charge of sixpence for entering and lying therein for a period not exceeding one week from the date of entrance; and for lying in the dock beyond one week awaiting the arrival of such ship or vessel, per ton register,

twopence; and as to these charges I think it cannot be said that they are on the whole higher than the charge made to vessels trading coastwise. The next group is thus worded: "Subject as hereinafter provided lighters which having discharged or received ballast or goods to or from on board of a ship or vessel shall remain in the dock beyond the first available tide after such lighter shall have completed the discharge or receipt of the ballast or goods, for lying in the dock for any period not exceeding one week, and for departing therefrom, sixpence. For lying in the dock beyond one week from the tide next following the completion of discharge or receipt of the ballast or goods per ton register, per week, twopence." To determine whether those are legal charges we must go back once more to the statutory powers which are the foundation of the dock company's right to charge. Nothing is to be found in them as to the lighter remaining in the dock after the first available tide after it has done its work, but we must consider whether that is a regulation which the dock company had power to make under its charging powers. Those powers are limited by the exemption in s. 136, which provides that the lighter shall be exempt so long as it is "bona fide engaged in so discharging or receiving the ballast or goods." If the lighter has finished its work, its business is to go out, and that promptly, and it is not a bad or unreasonable rendering of "promptly" that it should go out on the first available tide; it is a practical interpretation of what is, I think, provided for by s. 136—that is to say, the lighter must do its work and not loiter in the dock—and the requirement of the dock company seems a reasonable and sensible interpretation of the provision that it is to stay in the dock only as long as it is engaged in its work, and is not to loiter there afterwards. In my opinion, therefore, the dock company were entitled to consider that a lighter which does not go out by the first available tide after completing its work is afterwards not bona fide engaged in discharging or receiving; in fact, it is not so engaged at all; it is engaged in loitering, and is making no reasonable effort to get out. If it does not leave the dock with reasonable promptness, it is no longer exempt from the charges which can be made on lighters, and which may, if necessary, be as high as those made on vessels trading coastwise.

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I am of opinion, therefore, that there is nothing ultra vires in the two rates to which I have referred, and I have come to the conclusion that in these respects the rate book is right.

I come now to the question, which is nominally the first question for our consideration, but is substantially the least important, whether these two particular lighters under the particular circumstances of this case come within these rates, the making of which I have held to be justifiable. First I take the case of the *St. Thomas*. That vessel had finished its discharge into the *Pladda* at 5 P.M. on Saturday. I adhere to the previous decision of this Court that the fact that goods are shut out from a particular vessel does not prevent the lighter being engaged in discharging. In this case it appears, upon the uncontradicted evidence given by the dock company, that the first available tide—that is, the moment when the water was such that the lighter could leave the dock—was 9.30 P.M. on Saturday, which was three and a half hours before high water at 1 A.M. on Sunday. In my opinion it is impossible to contend that 9.30 P.M. is an hour at which lighters cannot be expected to work, and, as there were two and a half hours before midnight, I think that the lighter did not go out on the first available tide, and that after midnight (or even perhaps earlier) it was loitering and had ceased to be an exempted lighter. If it had ceased to be exempt, I think that the powers of the defendants to make a charge upon that lighter are the same as though there had been no exemption clause at all; they could put a charge upon it for being in the dock while not bona fide engaged in receiving or discharging; the rate they have charged is sixpence, and, subject to a point with which I now proceed to deal, I think that the charge was properly made.

The point I refer to is this. It was suggested during the argument that sixpence was not a reasonable rate of charge. It seems clear to me that it is not more than would be charged in the case of a vessel trading coastwise. It is true that the latter is charged a lump sum for entering, lying in, and departing, but there is nothing to shew that sixpence is more than the defendants are entitled to charge in the case of a lighter which has ceased to be exempt; I think, therefore, that this charge was

within the defendants' statutory power. That statutory power is limited by the Act of 1864 to a reasonable charge; but where the Legislature has provided a maximum charge expressed in figures, it must be shewn by satisfactory evidence that to charge the maximum would be unreasonable in the particular case before the Court will interfere. The evidence to that effect in the present case was of the flimsiest nature possible and really amounted to this, that one or two rival docks charged less under similar circumstances. It may be that those docks are free from the difficulty caused by loitering lighters, or they may desire to attract lighters to them, and it would be ridiculous to hold that the defendants are making an unreasonable charge merely because certain of their competitors are charging less. I see, therefore, no ground for saying that this charge was unreasonable.

Another point, which seems scarcely worth referring to, was suggested by some questions put in cross-examination, that a lighter under such circumstances must wait until the tide turns. I can find nothing in the evidence to shew whether the *St. Thomas* was going up or down stream, and I see no reason for suggesting that, whichever way the tide was running, it could not go outside the dock, and anchor outside, if necessary. I think, therefore, that in the case of the *St. Thomas* the defendants' charge was right.

In the second case, that of the *Jew*, we have to deal with a lighter which deliberately remained in the dock after the ship for which she entered had left the dock, a telegram having been sent ordering her to wait until another vessel arrived, on board which she was directed to put her goods. An ingenious argument was suggested on behalf of the plaintiffs to the effect that, as the lighter had entered the dock for the bona fide purpose of discharging to a particular vessel and was unable to do so, it was not unreasonable that she should wait in the dock and discharge to another vessel, because that course would save the dock company the trouble of locking it out and locking it in again. That argument makes little impression upon me, for although in this particular case it might have been for the benefit of both parties that the lighter should remain and so obviate the trouble to them both involved in leaving and re-entering the dock, it is

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plain that it would make an enormous difference if such a thing could be done without the permission of the dock company. They could always permit it, if they chose to do so; but we have to decide the rights of the parties, and if the owner of the lighter had the right to say to the dock company that they must allow the lighter to remain for a day or two until a certain ship arrived, or until the arrival of some ship that would take the lighter's goods or would discharge into her, because it would be less trouble than leaving and re-entering the dock, it is obvious that the mischief of lighters loitering in the docks would rapidly become an actual nuisance. Therefore, as we are deciding upon the rights of the parties, we have not to consider which would be the more convenient course for the lighter to take. With regard to the rights of the parties, I am of opinion that the *Jew* was bound to go out upon the first available tide after she had ceased to be engaged in discharging goods, and that in the circumstances she ought to have gone out by the first available tide after it was clear that her goods could not be received; the charge made by the defendants was therefore in her case also a proper one.

Two points were raised in argument which I have not referred to, and which I do not propose to decide. The first is whether Sunday is a working day for barges and lighters. It is unnecessary to decide that question because, in my opinion, the *St. Thomas* could and should have left the dock on the Saturday evening; if it were necessary to decide the question, I should require more evidence as to what is usual and necessary in working lighters on the Thames. The second point is whether the rate of twopence, which is mentioned in the schedule of the Act of 1882, is chargeable for a broken portion of a week; at present I am not satisfied that it is, and it seems to me that it is open to grave consideration whether a higher charge for lying in could be imposed than a charge at the rate of twopence per ton per week. The question, however, does not seem to arise in the present case, and it is unnecessary to say more about it. Another point was raised, though not seriously argued, that under the schedule to the Act of 1882 there was no power to charge for anything beyond entering the docks. The schedule speaks of vessels

entering for the purpose of lying in the dock, and vessels entering for the purpose of discharging or receiving cargo, and it was contended that the language took away any power to charge for departing. I can only say I think there is nothing in the argument. "Vessels entering" points simply to a class of vessels which can be charged, and the schedule is a schedule to a section that gives power to make charges for entering and departing respectively, and there is no justification for saying that the schedule excludes a charge for departing. For these reasons I am of opinion that both these rates or charges were good, and that the appeal of the defendants, the dock company, ought to be allowed.

Buckley L.J. read the following judgment:—The question is as to the proper construction of s. 136 of the London and St. Katharine Docks Act, 1864. There are two phrases in that section whose meaning it is necessary to determine, namely, (1.) the words "lying therein," and (2.) the words "so long as the lighter . . . . is bona fide engaged in so discharging or receiving." As regards the former the appellants contend that the words "lying therein" mean "lying in the dock at the time the lighter enters," and not "lying in the dock at the time the goods are discharged or received." They succeed, I think, in shewing that the construction which they attribute to the words makes them active and important, but they fail in persuading me that they are other than descriptive. Had it been intended to provide that as a condition of exemption the lighter should be entering to discharge to a vessel lying in the dock at the time of entrance, that intention could have been expressed in language much more plain. If there were nothing further in the section I should have been of opinion that the words "lying therein" were descriptive of the vessel that is to receive or discharge the goods from or to the lighter, and not expressive of a quality which must be attributed to the vessel at the moment of the lighter's entrance. But I pass on to add the further words which are secondly to be construed, for to do so assists, I think, in the construction of the first words. In place of the word "so" I will introduce the words to which it relates, and with that alteration

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will reproduce the material words of the section. It will run thus: "All lighters entering the docks to discharge goods to any ship lying therein shall be exempt so long as the lighter is bona fide engaged in discharging goods to any ship lying therein." In that sentence I see no reason for saying that the ship must be "lying therein" at any date other than the date of the discharge. The appellants argue that it does not mean what I have written; they say that in that sentence I must insert after the words "lying therein" in each place where they occur the words "at the date of entry of the lighter." I do not think so. The bona fide act, I think, is to be a bona fide discharge of goods to a ship in the dock. The bona fides of the act is not affected by the relative dates at which the lighter and the ship entered the dock.

My judgment, however, does not rest wholly or principally upon these grounds. The section concludes with a proviso that "all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever." I do not think it necessary to decide whether the ballast or goods in question would, but for those words, have been chargeable under s. 134. I express no opinion upon it one way or the other. For the purpose of construction I am entitled to say that s. 136 contemplates that these goods are or may be subject to some rate or charge, and provides that they shall be exempt from any rate or charge, if they are "so discharged or received." The construction for which the appellants contend necessarily involves that the ballast or goods spoken of will or may be subject or not subject to some rate or charge according to whether they are put into or taken from a lighter which entered the dock before or after the vessel to or from which the goods are discharged or received. I do not think the Act meant anything of the kind. The intention, I think, is to provide by these last words of s. 136 that goods dealt with by a lighter, as distinguished from goods dealt with otherwise than by a lighter, shall be exempt from rates and charges—a question with which the relative dates at which the lighter and the ship entered the dock have nothing to do. If I am right as to these concluding words, the phrase "lying therein" cannot mean "lying therein when the lighter enters." In my judgment,

therefore, the ship or vessel referred to in s. 136 need not be a ship or vessel lying in the dock at the time when the lighter enters. This will be found material when I come to state the facts, inasmuch as the *Somali* was not lying in the dock when the barge *Jew* entered.

For the purposes of this judgment it is unnecessary to decide a multitude of the points which have been raised in argument. It is not to be inferred from my silence about them that I agree with what Fletcher Moulton L.J. has said upon them. I forbear from deciding them because in my judgment they do not arise for decision. Amongst other things, it is unnecessary to decide whether a barge which enters, not for the purpose of discharge or receipt to or from a particular ship, but merely to look for a job, is within the section. This is not the same question as whether the particular ship must be one which is already in the dock when the lighter enters. Both the barges here in question entered for the purpose of serving a particular ship already in the dock. To dispose of this appeal it is sufficient to determine whether a barge which enters to serve a particular ship already lying in the dock, and, being unsuccessful in that adventure, continues in the dock bona fide for the purpose of discharging or receiving to or from some other ship, is exempt. In the previous case of *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (1) we held that a lighter which entered to serve a particular vessel was entitled to exemption although she failed in effecting that service and left without discharging. We decided nothing either for or against her continuing entitled to exemption if, having failed in that service, she bona fide remained to discharge another. In my opinion the lighter which enters to discharge or receive to or from a particular ship (being the case here in dispute) is exempt so long as she is bona fide engaged in discharging or receiving, whether she in the result discharges or receives to or from the vessel for whose service she entered, or to or from another vessel lying in the dock at the date of the discharge or receipt. It is a question of fact in each case whether the barge which entered for one purpose and fails in that purpose is still bona fide engaged in discharging or

(1) [1908] 1 K. B. 786.

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receiving. If she is, I think she is exempt. I repeat that in this judgment I intend to leave entirely open the question whether the barge which enters not for the purpose of serving a particular ship is exempt or not. The facts of this case do not raise that question.

Taking the two cases with which we have to deal, the *Jew* was exempt when she entered. She entered on November 23 to serve the *Matiana*, a vessel then lying in the dock. That vessel could not take her cargo and left on Saturday, November 25. Thereupon the *Jew* communicated with her owners for orders, and on Monday, November 27, received orders to discharge to the *Somali*, a vessel which entered on that day, and did so. The dock company on November 28 claimed against the *Jew* upon the footing of "expiration of privilege." In my opinion the *Jew* was exempt on entry into the dock, was down to November 28 bona fide engaged in the business of discharging or receiving, and was none the less so engaged by reason of the fact that the *Somali* did not enter until four days after the *Jew* entered; that consequently the *Jew* was entitled to exemption, and that the charge was erroneous. I may add that, as regards the *Jew*, nothing turns upon that which took place upon November 28.

As regards the *St. Thomas*, she entered on Friday, November 24, to serve the *Pladda;* she discharged into the *Pladda*, finishing by 5 P.M. on Saturday, November 25, and attempted to leave about 1 A.M. on Monday, November 27. The dock company detained her for payment of dues. High water on Saturday-Sunday night was at half an hour after midnight. Looking at the pleadings, the parties have not come here to argue that the barge ought to have left before midnight on Saturday. The question is whether she acted reasonably in lying in the dock during Sunday and leaving at 1 A.M. on Monday. The dock company have made a rate charging lighters which, having discharged goods, remain in the dock "beyond the first available tide." In fixing that limit of time the dock company have taken upon themselves to deal with what is, I think, a question of fact, namely, whether the barge down to the time of her departure was bona fide engaged in discharging or

receiving. She is so engaged during the entry, the actual discharge or receipt, and the departure, allowing a reasonable time for, amongst other things, departure. Under these circumstances the regulation may be perfectly reasonable that the barge shall leave by the first available tide. Under other circumstances that might not be reasonable. In my opinion the *St. Thomas* acted reasonably in leaving the dock by the early tide on Monday.

According to the practice and principles which to a large extent prevail in this country, Sunday is a day of rest. Apart from any religious observance of that day, it is generally recognized that continuous unbroken toil is not desirable or efficient, and Sunday work is not the rule, but the exception. The dock company by their own regulations recognize this. Selecting one instance as an example, rule 52 provides that unnecessary work shall not be done or permitted to be done on Sunday. The barge, having finished her work on the Saturday, was bona fide engaged within the section if she departed within a reasonable time. In my opinion to leave at 1 A.M. on Monday morning was departing within a reasonable time. The *St. Thomas* was therefore also, in my opinion, exempt. It results that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Keene, Marsland, Bryden & Besant.*
Solicitors for defendants: *E. F. Turner & Sons.*

W. J. B.

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Jan. 13, 14, 24, 27; *April* 6.

[IN THE COURT OF APPEAL.]

BANK OF ENGLAND *v.* CUTLER.

Stock, Transfer of—Personation of Holder—Identification of Transferor by Stockbroker—Effect of Transfer—Estoppel—Request to Bank to perform ministerial Duty—Liability to indemnify—Obligation of Bank to replace Stock.

Under the statutes authorizing the issue of India stock, transfers of that stock are invalid unless they are entered and registered in a book kept at the Bank of England, and are signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party claiming to transfer India stock is the person entitled to it, it is the custom of the Bank to keep a list of stockbrokers whose identification of intending transferors will be accepted by them. The Bank will also accept identifications made by some of their own officials, or by the representatives of private banks. In the case of transfers of amounts exceeding 2000*l.*, the Bank usually makes an independent inquiry as to the identity of the transferor, but in the case of smaller amounts it is practically impossible to do so. The defendant was on the above-mentioned list of stockbrokers. A woman fraudulently personated another who was a registered holder of India stock, and, having procured herself to be introduced to the defendant as the holder of that stock, instructed him to prepare a transfer. The defendant accordingly sent to the Bank a "ticket," that is a statement of the names of the transferor and transferee, the nature of the stock, and the amount to be transferred, from which ticket the Bank prepared a transfer in the transfer book, and the personator attended and forged the holder's signature in the book, the defendant identifying her as being the holder. The transfer being for a nominal consideration, the defendant, according to the usual practice in such cases, received a fee of one guinea for his services and attendance at the Bank from the transferor. The stock was subsequently transferred to G., who purchased it bona fide and for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register as the holder of the stock, and the Bank, in satisfaction of that claim, purchased stock of a like amount and transferred it into her name. The Bank then sued the defendant for indemnity in respect of their loss as upon a breach of warranty of the identity of the transferor:—

Held by Farwell L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), affirming the judgment of A. T. Lawrence J., [1907] 1 K. B. 889, that there was evidence on which the Court could find, and that the proper inference of fact was, that the defendant requested the plaintiffs to permit the entry and registration of the forged transfer, which involved the legal consequence that the defendant contracted to

indemnify the plaintiffs against any liability resulting therefrom; and that the plaintiffs were entitled to recover as damages the loss to which they had been put by having to purchase stock as aforesaid.

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APPEAL from the judgment of A. T. Lawrence J. in an action tried by him without a jury. (1)

The action was for breach of an implied warranty by the defendant of the identity of a person who executed a transfer of certain India 3½ per Cent. Stock.

In October, 1903, a Miss Marian May Pearson was the holder of 1544*l.* 15*s.* India 3½ per Cent. Stock, which had been issued under the provisions of 42 & 43 Vict. c. 60 and 43 Vict. c. 10. For the purpose of enabling the Bank of England to be satisfied that a party desiring to transfer India stock in their book is the person whose name appears in the book as being that of the person entitled to it, it has long been the custom of the Bank to require identification of intending transferors, and to keep a list of persons whose identification will be accepted by them, the list consisting of certain selected stockbrokers, the authorized clerks of such stockbrokers upon an undertaking by their masters to be answerable for their acts, the heads of the different offices in the Bank, and the past and present representatives of private banks. The defendant was a stockbroker whose name had for some years been upon that list.

In the month of October, 1903, one Annie Pearson, a half-sister of Marian May Pearson, and a Mrs. Jeanie Pearson, a relative by marriage, conspired together to misappropriate Marian May Pearson's India stock. Having obtained possession of her stock receipt, which gave the particulars of the amount standing in her name, they went on October 9 to a solicitor of the name of Bartrum, to whom Jeanie Pearson introduced herself as Marian May Pearson, and instructed him to procure a transfer of the India stock to one Abraham Loftus Tottenham, whose son, Loftus Tottenham, it was alleged, was about to advance a sum of money to Marian May Pearson. Loftus Tottenham had his father's authority to operate on his bank account, which was kept with Messrs. Coutts & Co. Mr. Bartrum, who had had previous business dealings with the defendant, sent his clerk,

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a Mr. Nuttall, with the two women to the defendant's office. Mr. Nuttall introduced Jeanie Pearson to the defendant as Marian May Pearson, the stockholder, and instructed him to prepare a transfer to Abraham Loftus Tottenham as upon a nominal consideration, the transfer being by way of security for a loan. The defendant accordingly prepared a document known as a "ticket," which was in the following form:

"This ticket is put forward by W. S. Cutler, stockbroker.
India 3*l.* 10*s.*

No. 1007.

Bank of England, the 9th day of October, 1903.

From

Miss Marian May Pearson,

of 5, Bridge Avenue, Hammersmith,

1544*l.* 15*s.* for 5*s.* India 3*l.* 10*s.* per Cent. Stock

To

Abraham Loftus Tottenham,

of 15, York Place, W."

and sent it to the Bank with a notice that he would attend in the course of the afternoon and identify the transferor. From that ticket a transfer from Marian May Pearson to Abraham Loftus Tottenham was prepared in the transfer book of the Bank; and later in the day the defendant met the two women at the Bank, when the transfer was executed by Jeanie Pearson signing the name of Marian May Pearson in the book, the defendant signing his name in the margin of the transfer under the words "witness to the identity of Marian May Pearson," and a new stock receipt was made out in the name of Abraham Loftus Tottenham. A "stock receipt" purports to be a receipt given by the transferor of inscribed stock to the transferee for the consideration money, in this case 5*s.*, the transferor's signature to the receipt being witnessed by a clerk of the Bank. As the transfer in this case took place after 1 o'clock, the Bank, in accordance with their custom, charged the defendant a "late fee" of 2*s.* 6*d.* On the same day the defendant sent to Mr. Bartrum his account, amounting to 1*l.* 3*s.* 6*d.*, of which 2*s.* 6*d.* was for the late fee, and one guinea for the defendant's attendance at the Bank. It appeared

that, where brokers sell inscribed stock for a client, they are remunerated for their trouble in identifying the transferor by their ordinary commission on the sale, but where they identify a transferor upon a nominal consideration, if the amount transferred is under 2000*l.*, they usually make the nominal charge of 1*l.* 1*s.*, though, when the amount transferred is larger, they charge a higher fee. Where the amount transferred is over 2000*l.*, it is usual for the Bank to make an independent inquiry as to the identity of the transferor, but where the amount is below that sum it is impracticable for the Bank to do so, and they made no such inquiry in the present case. Loftus Tottenham subsequently applied to Messrs. Coutts & Co. to advance him a sum of 1200*l.*, wherewith to make a loan to Jeanie Pearson. They insisted, before doing so, on having the stock transferred to themselves and on having a letter from Marian May Pearson authorizing that transfer. On October 16, 1903, Jeanie Pearson, writing in the name of Marian May Pearson, consented to a transfer by Abraham Loftus Tottenham to Coutts & Co., and to his raising 1200*l.* upon it, and she agreed to Coutts & Co. selling the stock whenever they wished to repay themselves the advance. The stock was accordingly transferred to Coutts & Co. On June 5, 1904, Jeanie Pearson, writing in Marian May Pearson's name, requested Messrs. Coutts & Co. to sell the stock and pay themselves off. They accordingly sold the stock on the market to a Mr. Gibbs, into whose name it was transferred in the Bank's transfer book. For two years after the date of the forged transfer Jeanie and Annie Pearson periodically paid to Marian May Pearson the sums which would have been payable as dividends on the stock, and thereby prevented her from suspecting the existence of the fraud. Towards the end of the year 1905 the forgery was discovered, and Annie and Jeanie Pearson were prosecuted for it, and convicted. Marian May Pearson then called upon the Bank to reinstate her name on the register, and the Bank purchased stock for that purpose at a cost of 1649*l.* 1*s.* 6*d.*, and paid her one dividend of 13*l.* 10*s.* 3*d.* which Jeanie and Annie Pearson had not paid her.

The Bank thereupon brought the action to recover from the

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defendant the sum of 1662*l.* 11*s.* 9*d.* as damages for breach by him of the implied warranty as above mentioned, in consequence of which they had been compelled to replace the stock in her name at the cost above mentioned. The defendant claimed an indemnity from Bartrum, whom he brought in as third party. At the trial Mr. Gibbs was not called as a witness. The issue between the defendant and the third party was not then tried, but counsel for the third party were allowed to address the Court on the issue as to the liability of the defendant to the plaintiffs.

The learned judge gave judgment for the plaintiffs for the amount claimed. (1)

Jan. 13, 14, 24, 27. *Danckwerts, K.C.*, and *Norman Craig*, for the defendant. There are two questions in this case. The first is whether what took place when the transfer was signed by Jeanie Pearson imported a warranty by the defendant that she was Marian May Pearson, the true owner of the stock supposed to be thereby transferred; the second is whether, if there was a warranty and a breach of it, any loss sustained by the Bank followed from that breach of warranty. With regard to the latter question, it is contended that the answer must be in the negative. The forged transfer was a mere nullity, and no title to the stock passed by it. Therefore Marian May Pearson continued to be the owner of the stock supposed to be transferred, and, as soon as the Bank ascertained that the supposed transfer was a forgery, they were entitled, and it was their duty, to restore the name of Marian May Pearson, who had never ceased to be owner of the stock, to their books as that of the owner of that identical stock: *Davis* v. *Bank of England*. (2) The persons to whom that and subsequent transfers of the stock purported to be made never really became owners of any stock, nor did the Bank become liable to them as such owners. The only way in which the Bank could be made liable to them would be by action for damages by reason of some estoppel preventing the Bank from denying in an action for damages that they were owners of stock. They could have no real title to the stock in specie which still belonged to

(1) [1907] 1 K. B. 889.
(2) (1824) 2 Bing. 393; (1826) 5 B. & C. 185.

Marian May Pearson. It was not shewn that in this case any such estoppel existed between any one to whom a transfer of the stock purported to be made and the Bank. In order to give rise to such an estoppel, it must be shewn that the Bank made a representation that the forged transfer was valid, intending that the supposed transferee should act upon it, and that he, believing it to be true, did act upon it to his detriment: *Carr* v. *London and North Western Ry. Co.* (1) The supposed transferee who claims under a forged transfer has no real title to any stock which he can pass on to a subsequent transferee, but his right, if any, is to claim damages, relying on an estoppel as between himself and the Bank. He cannot transfer that estoppel to a subsequent transferee; therefore the ultimate transferee claiming under the forged transfer must, in order to recover from the Bank, shew an estoppel as between himself and the Bank. If there ever was any estoppel in favour either of Abraham Tottenham or of Coutts & Co. as against the Bank, that estoppel was dead as soon as they respectively executed transfers of the stock and were paid off, for at no subsequent period could they have alleged that the Bank were precluded from denying that their names were then properly on the register: *Simm* v. *Anglo-American Telegraph Co.* (2) Moreover, it cannot be said as regards Abraham Tottenham or Coutts & Co. that either of them acted on the faith of what was done by the Bank in registering them as owners of the stock. Coutts & Co. refused to advance money or to deal with the stock until they had authority in writing from a person whom they supposed to be Marian May Pearson, the real owner of the stock; and it was therefore on the faith of that authority, and not of the supposed transfer, that they acted. The Bank did not prove the existence of any estoppel as between them and Gibbs. Gibbs was not called as a witness. There was no evidence that he relied on the genuineness of the preceding transfers or on any implied representation by the Bank that Coutts & Co. were entitled to the stock. There is no presumption of law that he acted on the faith of the transfers, and it was never

(1) (1875) L. R. 10 C. P. 307, at p. 317.
(2) (1879) 5 Q. B. D. 188.

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proved that in point of fact he did so. The cases shew that there is a duty cast upon the Bank, as between themselves and the owners of stock, to keep their registers correct, but that is a duty which they owe, not to persons coming as transferees, but only to owners of stock, which the supposed transferees never became: see *Sheffield Corporation* v. *Barclay.* (1) [They also cited on this point *Barton* v. *North Staffordshire Ry. Co.* (2); *Taylor* v. *Midland Ry. Co.* (3); *Ashby* v. *Blackwell* (4); *Sloman* v. *Bank of England* (5); *Harrison* v. *Harrison* (6); *Johnston* v. *Renton* (7); *Borland's Trustee* v. *Steel Brothers & Co.* (8); *Hildyard* v. *South Sea Co.* (9); *In re Bahia and San Francisco Ry. Co.* (10); *In re Ottos Kopje Diamond Mines* (11); *Balkis Consolidated Co.* v. *Tomkinson.* (12)]

With regard to the question whether the defendant warranted that Jeanie Pearson was Marian May Pearson, the true owner of the stock, it is contended that there was no evidence of such a warranty. It is the duty of the Bank to allow and register a transfer by a stockholder, and they must at their peril ascertain whether a person demanding to transfer stock is entitled to do so, for which purpose they are entitled to a reasonable time for making inquiries. It is for the purpose of performing their duty in that behalf that they have instituted the practice with regard to identification of transferors by certain brokers whom they have selected. It is, therefore, in the interests of the Bank that the broker acts in identifying the person claiming to transfer, and not as agent for that person or the transferee: *Simm* v. *Anglo-American Telegraph Co.* (13); and, though it may be that a duty towards the Bank to use due care in identification is cast upon the broker, it is not a reasonable implication from the nature of the transaction that he requests the Bank to allow the transfer or warrants the identity of the person transferring. The broker

(1) [1905] A. C. 392, at p. 403.
(2) (1888) 38 Ch. D. 458.
(3) (1860) 28 Beav. 287; (1862) 8 H. L. C. 751.
(4) (1765) 1 Amb. 503.
(5) (1845) 14 Sim. 475.
(6) (1740) 2 Atk. 121.
(7) (1870) L. R. 9 Eq. 181.
(8) [1901] 1 Ch. 279, at p. 288.
(9) (1722) 2 P. Wms. 6th ed. 76.
(10) (1868) L. R. 3 Q. B. 584.
(11) [1893] 1 Ch. 618.
(12) [1893] A. C. 396.
(13) 5 Q. B. D. 188, at pp. 203, 209, 214.

in such a case as this does not in point of fact, or by implication, request the Bank to allow the transfer. The person who so requests is the person claiming to make the transfer. If every statement upon which it is intended that another shall act is to be treated as involving a request to him to act, then there is really an end of the principle affirmed in *Derry* v. *Peek*. (1) In *Starkey* v. *Bank of England* (2) the broker did request the Bank to act, for he was acting as transferor under a power of attorney, and he signed "the demand to act" indorsed on the power of attorney; and in *Sheffield Corporation* v. *Barclay* (3), the defendants sent the forged transfer to the corporation, requesting them to act on it and transfer the stock to themselves. The Bank allows transferors to be identified by their chief officials and also by private bankers, as well as by brokers. Could it be contended by them that one of their own officials, or a private banker, identifying a transferor, warranted his identity? If so, the contention of the Bank comes to this, namely that, although it is their duty under 42 & 43 Vict. c. 60, s. 9, to allow and register transfers of India stock by stockholders, and, in respect of their undertaking that duty, they are highly privileged, and remunerated, they refuse to carry out their duty except on the condition that some one shall insure them in the performance of that duty by warranting the identity of the person claiming to make the transfer. There is no enactment by which they are entitled to insist on such a condition. The broker does not really fill the part of an actor, either as agent for the transferor, or otherwise, in the transaction of transfer. He merely, at the request of the Bank, and in their interests, acts as a witness to the identity of the transferor, and, at the outside, he merely undertakes to use due care in the matter. The putting forward of the "ticket" is not a request to the Bank to allow the transfer, but merely a notice to them in order that they may have the transfer in readiness beforehand. The mere facts that the broker sends that notice, and receives from the transferor the small fee of one guinea for his trouble in attending at the Bank, are not, in reason, ground for the inference that he acts as agent

(1) (1889) 14 App. Cas. 337. (2) [1903] A. C. 114.
(3) [1905] A. C. 392, at p. 403.

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for the transferor or requests the Bank to allow the transfer. The broker acts merely as witness, and not really as agent for anybody, in the matter; but, if he does act as agent, he acts as agent for the Bank. In all the cases in which a warranty has been implied from a request to do an act, the act was one which the person making the request was interested in having performed.

Sir R. B. Finlay, K.C., and *J. Eldon Bankes, K.C.* (*Rowlatt* with them), for the plaintiffs. The transaction imported a warranty by the defendant that the person executing the transfer was Marian May Pearson, the owner of the stock. This case is not one of mere misrepresentation, the class of cases to which the decision in *Derry* v. *Peek* (1) applies, but one of the class to which *Collen* v. *Wright* (2) belongs, namely, cases where a person who has requested another to act on the footing that a certain state of things exists is taken to have warranted its existence, and is therefore bound to indemnify the person so acting to his detriment. A person who requests another to do a ministerial act, not prima facie wrongful, warrants that the circumstances are not such as to render it wrongful, and is bound to indemnify the doer of the act if, from circumstances unknown to him, it turns out to have been wrongful: *Sheffield Corporation* v. *Barclay*. (3) Upon the facts proved it must be taken that the defendant requested the Bank to allow, and give effect to, the transfer signed by Jeanie Pearson. The case may be put alternatively. The defendant himself affected to act as broker or agent for the transferor in the transaction, and charged a fee for so acting. But, apart from any question of agency, he himself took the part of an "actor" in the transaction. The "ticket" which was prepared and forwarded by himself as instructions to the Bank for the transfer, and which contained a statement that it was put forward by him, operated as a request to the Bank by him to allow and register the transfer; but, even apart from that, it is submitted that what took place on the signature of the supposed transfer imports such a request by him. The signature of his

(1) 14 App. Cas 337. (2) (1857) 8 E. & B. 647.
(3) [1905] A. C. 392.

name in the margin of the transfer as witness to the identity of Marian May Pearson under the circumstances imports a request by him to the Bank from which, as a matter of law, a warranty must be implied. The broker in such a case does not identify the transferor as agent for the Bank, or in their interests, as is shewn by the fact that the remuneration for the broker's trouble in identification is paid by the person employing him, or covered by the commission on the sale paid by that person. The case is therefore really on all fours with *Starkey* v. *Bank of England.* (1) If the true inference of fact is that there was a request by the defendant to the Bank to allow the transfer, then the case cannot be distinguished from *Sheffield Corporation* v. *Barclay.* (2) With regard to the question whether the Bank have shewn that they suffered the loss in respect of which they claim by reason of the defendant's breach of warranty, it is clear that they were bound to reinstate Marian May Pearson in the same position as she occupied before the supposed transfer, and, under the circumstances, they could only do so by purchasing an equivalent amount of stock and transferring it into her name. There is no specific stock which is identifiable in such a case. All that a stockholder is entitled to is a certain amount of stock. [They were stopped on this point.]

Danckwerts, K.C., for the defendant, in reply. In the cases in which a warranty, or promise to indemnify, has been implied from a request to a person to do a ministerial act, not prima facie unlawful, but which afterwards turned out to be so, the person requested was not subject to a duty to act in the matter on his own responsibility. Where the person requested to do an act is subject to such a duty there is no such implication: *Evans* v. *Collins.* (3) Here the Bank were under a duty to allow and register transfers by stockholders on their own responsibility. [He also cited *Low* v. *Bouverie* (4); *Dickson* v. *Reuter's Telegram Co.* (5); *Oliver* v. *Bank of England* (6); 33 & 34 Vict. c. 71, s. 24.]

Cur. adv. vult.

(1) [1903] A. C. 114.
(2) [1905] A. C. 392.
(3) (1844) 5 Q. B. 804.
(4) [1891] 3 Ch. 82.
(5) (1877) 3 C. P. D. 1.
(6) [1902] 1 Ch. 610.

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April 6. VAUGHAN WILLIAMS L.J. read the following judgment: I regret to say that I differ from my brothers in this case, and, as my judgment turns upon a right understanding of the facts, it must necessarily be somewhat long. In this case the question is whether, under the circumstances, the identification at the Bank of England by the defendant of the person signing a transfer of East India stock constituted a warranty that the woman so identified was Marian May Pearson, a person entitled to and in whose name there then stood the sum of 1544*l.* 15*s.* India 3½ per Cent. Stock.

By the statement of claim the plaintiffs, after stating the statutory duty of the plaintiffs in respect of assignments or transfers of India 3½ per Cent. Stock, and that, for the purpose of enabling the plaintiffs to be assured that persons desiring to transfer such stock are the persons entitled to the same, it is and has long been the custom of the plaintiffs to keep a list of brokers upon the London Stock Exchange, duly introduced to the plaintiffs for the purpose, whose identification of such intending transferors will be accepted by the plaintiffs, and that the defendant had caused himself to be introduced to the plaintiffs for the said purpose, and his name had been placed and was on the said list, then go on to allege, first, that the identification by the defendant was made with the intent that the woman so identified might, as she then claimed to do, sign a transfer of such stock as being Marian May Pearson, and to the intent that the plaintiffs should act upon such identification and allow the said woman to sign the said transfer, as the plaintiffs in fact did, and, in conclusion, allege that by such identification the defendant warranted that the said woman was the Marian May Pearson entitled to the said stock, and, alternatively, that the defendant, by such identification, requested the plaintiffs to permit the said transfer, and agreed to indemnify the plaintiffs against loss or damage resulting therefrom.

I should observe that on the evidence it is plain that the custom of the Bank of England was to accept this evidence in the sense of "receiving" it, and not in the sense of accepting it as conclusive.

I think that, although there is no evidence that the defendant

expressed in words either of these alleged intents, these intents must be inferred in the sense that the defendant knew that identification was a condition precedent to the signature of the transfer by the woman whom he identified as Marian May Pearson, and in the sense that he anticipated that upon his identification the Bank would probably allow the woman thus identified to sign the transfer; but I do not think that identification coupled with this knowledge and anticipation by the defendant as to the probable action of the Bank of England is sufficient to raise the alleged implied request or the consequent warranty; for to raise such a warranty the request must be made under such circumstances as to justify as a matter of law the inference that the parties to the transaction must have intended the contract implied—that is, in this case, the warranty. Sometimes the contract implied is a contract to pay for work done, as where some one asks an artificer to do work and the law implies a contract to pay him therefor; sometimes a warranty of reasonable skill is raised against a professional man in respect of his profession, which he, by holding himself out as belonging to it, invites other persons to allow him to exercise; or a warranty is raised against a tradesman selling food that the food is fit for human consumption. Many illustrations might be given, but in each case there must be a request, and the request or invitation must be under such circumstances that one can as a matter of law imply the intention to warrant; and, generally speaking, such intention will not be inferred except in cases where the request or invitation is made by some one who will derive a benefit from compliance with the request.

Identification by a witness is the basis of this claim. The warranty and the request are implied from the identification. Generally the request, in the reported cases, has been the basis of the claim, and the warranty or contract of indemnity has been the consequence. As argued before us, the plaintiffs' case has been based rather upon a request for the performance of a ministerial duty than on mere identification; and Sir Robert Finlay, for the plaintiffs, argued that the request can be found in the circumstances of identification, which, he contended, involve the intent of the defendant that the woman identified should be

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allowed, as she claimed to do, to sign the transfer, and also the intent that the plaintiffs, the Bank of England, should act upon the identification, and that these intents constitute a request.

In my opinion the identification was a mere step towards the satisfaction of the Bank as to the identity of the would-be transferor, which the Bank might (if they chose) follow by further inquiries, which, as a matter of practice, were always made in cases where the amount of stock to be transferred exceeded 2000*l.*, and occasionally where it was under 2000*l.*

I propose now to say a few words as to the law which, upon the decided cases, we have to apply in dealing with the present case. What are the conditions under which the truth of an innocent statement made to and acted on by another person to his damage ought to be held to be warranted by the person making the innocent statement, or under which a promise by him to indemnify the person acting on such statement ought to be inferred? Lord Halsbury, in his judgment in the House of Lords in *Sheffield Corporation* v. *Barclay* (1), says, adopting the proposition of Mr. Cave, arguing for the plaintiff in *Dugdale* v. *Lovering* (2): "It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." And Lord Davey in his judgment in the same case (3) states: "I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But of course it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not

(1) [1905] A. C. 392. (2) (1875) L. R. 10 C. P. 196.
(3) [1905] A. C. 399.

seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal, but is, in fact, illegal, and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request or could not with reasonable diligence have discovered it." And later in the same judgment Lord Davey says: "I am also of opinion that the authority keeping a joint stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register." *Sheffield Corporation* v. *Barclay* (1) was decided on the ground that the transfer was put forward as a genuine document, and that the corporation were invited by the bank to act upon it as such. Sometimes the obligation to indemnify is implied in cases where the request is made by a person representing that he is an agent for another acting with authority, and it turns out that the alleged agent, who may himself have been deceived by forgery or otherwise, has no such authority. *Oliver* v. *Bank of England* (2) is an instance of this class of case. Sometimes the obligation is implied in cases where the person entitled to be indemnified is a person who is called on to perform a ministerial duty, statutory, or common law. *Sheffield Corporation* v. *Barclay* (1) and *Attorney-General* v. *Odell* (3) are instances of this class. But in every case the ratio decidendi is the same; the warranty or promise of indemnity is based on a request made. It is true the request need not be expressed in words, and that both the request and the promise of indemnity implied therefrom may be implied from conduct and circumstances, including the relation of the parties as one of the circumstances—including, that is, in the present case that the defendant was one of a class of witnesses whose testimony the Bank of England was willing to accept and consider when

(1) [1905] A. C. 392. (2) [1902] 1 Ch. 610.
(3) [1906] 2 Ch. 47.

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satisfying itself as the "parliamentary bookkeepers of this fund": see *Sloman* v. *Bank of England.* (1)

Let us consider what facts we have here. First, there is the mere fact of identification. It seems to me that under the circumstances of the present case neither a warranty nor a request that the person to whom this communication was made would act thereon would arise from identification alone, even though such identification might be made in anticipation that it would be acted on. One has to ask oneself, what is the relation of the defendant, on whose identification the Bank of England acted by registering the transfer, and thus altering the account which they had a statutory duty towards the stockholders to keep, first, to the Bank of England, and, secondly, to the person claiming as a stockholder to transfer a certain amount of stock? The duty of the Bank of England is defined by s. 9 of 42 & 43 Vict. c. 60 and by s. 7 of 43 Vict. c. 10. I think that it is common ground that under these Acts the Bank of England owe a duty to every one interested in the stock to satisfy themselves as to the identity of the would-be transferor, but owe no such duty to the individual who presents himself averring that he is a stockholder entitled to transfer stock of a given amount, although they would refuse such transfer at their own risk, and would be liable to an action if such refusal were wrongful, and for their own satisfaction they select the classes of witnesses whose evidence of identity of the person claiming to transfer they will receive, believing them to be likely to be credible witnesses, but knowing that some of them must rely on introductions by others to them. For the purpose of enabling the Bank of England to be satisfied that the person desiring to transfer India stock in their book is the person whose name appears in the book as being that of the party entitled to it, it has long been the custom of the Bank to require identification of intending transferors, and to keep a list of the brokers and their clerks whose identification will be received by them; and, besides the persons in this list, the identification by certain officials of the Bank of England, namely, heads of offices in the Bank, and past and present representatives of private banks, is in practice received by the

(1) 14 Sim. 475, 486.

Bank of England. The defendant, Cutler, is one of the brokers who, after the required introduction to the Bank, has had his name placed on the list of those whose identification will be accepted by the Bank, but not necessarily acted on without further inquiry. I would observe, further, this, that the fact that other persons besides brokers whose names are on this list, persons who in fact are not brokers, are accepted by the Bank as identifiers shews that profession of agency as a broker acting for the would-be transferor is not a condition or qualification of giving the identification required by the Bank of England. Thus far it seems clear that identification involves no representation of agency, nor any request that the would-be transferor may be allowed to sign the transfer, or that the transfer may be entered or registered. Thus far the identification seems nothing more than an identification by a witness whose credibility is prima facie accepted by the Bank, and whose obligation is to be honest and careful, which is an obligation involving no warranty express or implied. This view of the position of the identifier, be he a broker whose name appears in the list of introduced brokers, or be he an officer of high position in the Bank, who, by reason of his office, is accepted by the Bank as an identifying witness, that he is in truth a witness and nothing more, is confirmed by the form of letter prepared by the Bank for signature by brokers on the list who request that their clerk may be permitted to attest the identity of stockholders, their executors, administrators, and attorneys. This form, which is numbered "G 313" of the Bank of England forms, runs thus: "To the Governor and Company of the Bank of England. London, 8th February, 1901. Gentlemen,—I request that you will permit Mr. Peveril Francis Fletcher, my clerk, to attest the identity of stockholders, their executors, administrators, and attorneys, making transfers of stock, and also receiving dividends, and I engage to be responsible to you for his conduct in so doing, in like manner as if I had personally attested the identity of the persons making the transfer or receiving the dividend in each transaction. I am, Gentlemen, your obedient servant, W. S. Cutler. Signature of clerk, Peveril Fletcher." It will be observed that the form speaks of permission to the clerk to attest

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the identity of stockholders, their executors, administrators, and attorneys, and speaks of the responsibility of his master, the broker, as being as if he had personally attested the identity of the persons making the transfer or receiving the dividend in each transaction. It is obvious that "attestation" is appropriate to a witness and not to a person professing to be an agent of the transferor or to a person demanding that the transfer may be entered and registered. In my opinion there is nothing in the facts proved to justify the inference that the identifier, to whichever of the privileged classes he belongs, is anything more than a mere witness. It is noteworthy that the practice of the Bank in transactions exceeding 2000*l.* is not to act upon mere identification by the witness, but to test identity by comparison of signatures obtained by a letter written, addressed to the transferor, requiring an answer, and otherwise.

The next fact material to the character in which the identifying witness identifies is the document called "the ticket." This document, which is generally prepared by a broker, gives the name, address, and description of the transferor, the nominal amount of the stock, the name of the stock, and the name, address, and description of the transferee. The particular ticket in respect of this transaction was dated October 9, 1903, and ran as follows: "This ticket is put forward by W. S. Cutler, stockbroker. India 3*l.* 10*s.* No. 1007. Bank of England, the 9th day of October, 1903. From Miss Marian May Pearson, of 5, Bridge Avenue, Hammersmith, 1544*l.* 15*s.* for 5*s.* India 3*l.* 10*s.* per Cent. Stock. To Abraham Loftus Tottenham, of 15, York Place, W., Esquire, N.A. Examined," &c. It is a document that generally is dropped into a box, a sort of letter-box, which is open until 1 o'clock on transfer days. After 1 o'clock it is handed in at a special office together with an expedition fee of 2*s.* 6*d.* It is not a statutory document, but is a form of document adopted by the Bank in practice, and on the evidence of the Bank officers the object of the document seems to be to enable the Bank to prepare a transfer and thus save time. The next step is the attendance of the person claiming to have the transfer entered and registered in the books of the Bank. Sir Robert Finlay in his argument

before us contended that the identifying broker would be liable if there was no sending in of the ticket by him, and the statement of claim makes no mention of the ticket as a material fact. The Bank, unless there is a witness to the identification of the transferor, would not allow the person claiming to sign the transfer to do so unless the transferor was a person known to the Bank officials. In every case where there is no power of attorney the transferor has to be present and to sign the transfer, which transfer is witnessed by a clerk of the Bank attending in the transfer office and by the identifier. In a case of identification by a member of one of the privileged classes of witnesses the witness to the identification is not necessarily the person who puts forward the ticket. It was admitted that it is known to the Bank that in practice brokers, having regard to the limited number of brokers on the list and the multiplicity of transferors, do not know personally the proposing transferor, but have to rely upon the statement of somebody who introduced him to them. In my judgment, the ticket which is required in practice by the Bank is a document required merely for economy of time, and in no way affects the character of the identification. Thus far the identification is merely identification by a witness. There is nothing in this document which requests, directs, or demands a transfer. It is the transferor who, except in cases where he chooses to execute the transfer by an agent, duly appointed by power of attorney, requests, directs, or demands that the Bank shall exercise its ministerial duty. In the present case there can be no doubt but that the would-be transferor, the forger, herself requested the Bank of England to allow her to sign the transfer in the books of the Bank, and on her request she was allowed to so.

The next thing relied upon against the defendant is that he is paid by the transferor a fee for his attendance at the Bank for the purpose of transferring the India stock on behalf of the transferor, and that that fee is entered up in the defendant's brokerage book. I do not think that these documents justify a conclusion that the defendant was acting as a broker in the ordinary sense of the word. He clearly was not receiving the ordinary broker's commission for buying or selling, a commission

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which is calculated on the amount bought or sold; he was receiving a fee for attending the transfer as a witness. The principal being present, there was no need for the presence of a broker qua broker. I think now I have detailed the principal facts relied upon to raise the implied request and the implied warranty arising thereon.

I agree with A. T. Lawrence J. that the stockholder could make the request personally or by an agent, and either expressly or impliedly. And I agree that the question is, Did the defendant make the request here and represent that he made it on behalf of the true stockholder? That means, as I understand it, did he as agent for the stockholder make such a request? It is plain that he made no express request, either by writing or by word of mouth. He did nothing which corresponds to the demand appearing at the end of the form of the power of attorney required by the Bank of England to be used when the application is made by an agent to be allowed to execute a transfer of stock on behalf of an absent stockholder. There is nothing equivalent to the words "I demand to act by this letter of attorney."

A. T. Lawrence J. asks himself the questions, Did the defendant request or direct the plaintiffs to permit the transfer of this stock to be made, and did he represent that he made such request on behalf of the true stockholder? And he answers those questions in the affirmative. The facts which he relies upon to justify this conclusion he thus states: "I think the drawing up of this ticket, the taking it to the Bank, the payment of 2*s.* 6*d.* to get the transfer expedited and made ready on the same day, the attendance at the Bank with the proposed transferor, and the identification of the forger as the stockholder constitute, when taken together, as distinct a request to permit the transfer to be made in the books as the 'demand to act' under the power of attorney did in the case of *Starkey* v. *Bank of England*" (1); and he adds: "He (the defendant) said in evidence that his part of the transaction was simply putting it through the Bank." The learned judge does not rely on the ticket alone as constituting a request. The learned judge on these grounds says: "I come, therefore, to the conclusion as a

(1) [1903] A. C. 114.

matter of fact that the defendant did request the Bank to permit Marian May Pearson to make this transfer, and did identify this woman Jeanie as Marian May Pearson, the true owner of the stock."

It seems to me that the learned judge does not in this passage sufficiently bear in mind that the question is not the mere question of what facts are proved by the evidence, but what inference can the Court draw as a matter of law from the facts proved. The request is not a fact, but an inference of law from the facts. It is an inference of law. The soundness of this conclusion depends to my mind entirely upon the character in which the defendant did the acts which are relied upon by the learned judge in drawing the conclusion of fact which he does. If in truth and in fact he was a witness, I do not think that these acts would convert him into an actor in the transaction making a request which would raise a warranty of identity. I have already expressed my view of the various steps in the transaction. I find it difficult to suppose that, if corresponding steps in the identification of the stockholder had been taken by one of the high officials of the Bank of England, or if one of the past and present representatives of private banks or any other person who derived no benefit from the transfer being carried through had identified the would-be transferor, this would have been treated by the Bank of England as an identification of the stockholder which constituted a request to permit a transfer to be made in the books, and a promise to indemnify the Bank in case the identification should be a mistake. Sir Robert Finlay in his argument relied strongly upon the fact that Mr. Cutler was a broker and received a fee for identification, to which I would observe he was entitled whether or not the Bank acted on his evidence. But I do not think that the fact that a witness received a fee, be that witness a broker or not a broker, alters the character of his function and converts a witness into an actor in the transaction.

It is remarkable that there is no reported case in which the Bank of England has sued a broker on a promise to indemnify based on identification by a broker whose name appears in the Bank's list of brokers introduced to the Bank, whose identification the Bank will receive as evidence of the identity of the

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transferor, and there is no evidence of any custom throwing on broker witnesses such an obligation. What the broker does when he identifies is, as appears from the forms issued by the Bank itself, an attestation of identity and no more. The very fact that the Bank, in cases where the amount of stock is over 2000*l.*, will not act upon the attestation of the broker is strong to shew that the broker makes no request upon which the Bank are willing as of course to permit the transfer to go through.

The outcome of these facts and considerations which I have stated is that I have grave doubt as to whether the judgment of A. T. Lawrence J. can be supported. I am well aware that the trend of recent cases has been to relieve those who have performed a ministerial duty from any loss consequent upon their acting on a forged instrument in the performance of their ministerial duty; and there can be no doubt that in this case, if the Bank acted upon the request of Cutler, the defendant, Cutler is under the obligation to indemnify the Bank, but the Bank must prove the circumstances upon which the request by Cutler can be implied as a matter of law. Cutler, in fact and in form, was a witness. The would-be transferor, Jeanie Pearson, the forger, was present, and demanded to sign the transfer in the Bank books, and she did so in fact; there was no necessity for any request or signature of any one but the woman herself, and it seems to me that to imply a request by Cutler under these circumstances goes beyond any of the cases heretofore decided. It may be that the House of Lords will decide that a request, and the consequent obligation to indemnify the authority which has acted to its detriment upon the request, ought to be implied in every case of identification by one of the privileged classes whose testimony of identification the Bank by its practice is willing to receive, and may make that implication whether the sum to be transferred exceeds or not 2000*l.*, or it may be that the implication is limited to the case of identification by a broker; but I think that the implication in each of these cases will be an extension beyond anything heretofore decided.

The position taken up by the Bank of England seems to be that they will decline to perform their statutory duty as parliamentary book-keepers in reference to this stock unless the

would-be transferor is identified by a witness who will undertake to indemnify the Bank if it should turn out that the person identified is not in fact the stockholder entitled to the stock the subject of the proposed transfer. I doubt whether the Bank of England have a right to take up this position, and, even if they have, I think that the forms should expressly state on the face of them the liability incurred by the identifying witness. Under these circumstances I think that the right conclusion is that the judgment of A. T. Lawrence J. cannot be supported.

Besides the points to which I have already referred, Mr. Danckwerts contended that, assuming that Cutler did give the Bank a warranty, the Bank would have no cause of action against him unless they had acted on that warranty in such a manner as to incur an obligation towards somebody else, and then that the only cause of action would be for damages for breach of warranty measured by the extent of the obligation they have incurred to somebody else; and he then took all the transferees from Tottenham to Gibbs, and argued that to no one of them had the Bank incurred any obligation. First, he contended, and rightly contended, that no one of those persons could claim a title under the transfer of stock by virtue of the forged transfer of Jeanie Pearson, because such transfer was void and in no way affected the title of the true owner, whose name was forged; and he cited the case of *Hildyard* v. *South Sea Co. and Keate* (1), and pointed out that Sir Joseph Jekyll in that case ordered that the South Sea Company should take the 700*l.* South Sea stock transferred to the defendant by virtue of the forged letter of attorney and restore it to the plaintiff Hildyard; and he rightly argued from this that the only possible claim under which the Bank could incur an obligation would be a claim by estoppel—a claim, that is, based upon the assumption of a state of things which did not in truth exist—and that, in order to avail himself of such an estoppel, the plaintiff would have to shew a cause of action against the Bank for doing or refusing to do something inconsistent with the plaintiff's rights as stockholder, which the estoppel would prevent the Bank from denying. It is plain that Tottenham, for whose

(1) 2 P. Wms. 6th ed. p. 76.

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benefit as transferee the forged transfer was presented to the Bank, could not rely upon any such estoppel. And then he said with regard to Messrs. Coutts, who took a transfer from Tottenham, that they were not induced to do this by the inscription in the bank books of Tottenham's name as a stockholder, but by a correspondence which they had which purported to be with Marian May Pearson, but was really conducted by Jeanie Pearson, who forged her sister's name. And Mr. Danckwerts further contended that, as far as both Messrs. Coutts' bank and Gibbs were concerned, the Bank of England had never done anything inconsistent with the facts which they were estopped from denying, or refused to do anything which Coutts & Co. or Gibbs respectively would be entitled to demand in accordance with the facts which the Bank were estopped from denying. This seems to be accurate in fact. What the Bank seem to have done was this. Having the power to vacate all these transfers flowing from Jeanie Pearson's forgery, they, instead of doing this, which might have left them open to causes of action based on representations and facts which the Bank were estopped from denying, went on to the Stock Exchange and purchased stock to the amount of Marian May Pearson's holding, and transferred such stock to her, and left Gibbs' holding undisturbed. I think it may be said in answer to this that it was a reasonable course for the Bank to pursue, since it might mitigate the damages for which the Bank would be liable, and which ultimately Cutler would have to pay for his breach of warranty. On the other hand there is the difficulty that it may be doubted whether Coutts' bank, having been paid, or Gibbs, whose holding had not been vacated, could now claim the benefit of the estoppel: see *Simm* v. *Anglo-American Telegraph Co.* (1) I think that the answer to this is that at the moment the Bank elected to replace Miss Marian May Pearson's stock it was open to them to have vacated the transfer to Gibbs and to have refused to pay the dividends to him, in which case Gibbs would have had a good cause of action based upon the inscription in the books of the Bank of the holding of his transferors, Coutts' bank. There was another point made—that the Bank of England ought not to

(1) 5 Q. B. D. 188.

replace the stock, the only remedy of Gibbs, if he had brought his action, being damages, and that, even assuming a warranty, Cutler cannot be called on to reimburse the Bank the money expended in purchasing the stock to replace Miss Pearson's stock. But I think there is nothing in this point.

FARWELL L.J. read the following judgment:—The appellant's contention on this appeal raises two points—(1.) that the appellant has come under no liability to the Bank, and (2.) that, if he has, the Bank have suffered no damage with which they can charge him. A. T. Lawrence J. has decided against both these contentions, and I agree with the conclusion at which he has arrived. The law on the subject has been recently stated by Lord Davey in *Sheffield Corporation* v. *Barclay* (1) thus: "I think that the appellants have a statutory duty to register all valid transfers, and on demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and, without any default on his own part, acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it." The Bank in this case has the same duty and is in the same position towards holders of India stock as was the corporation in that case to its bondholders. The only question, therefore, is one of fact. Did

(1) [1905] A. C. at p. 399.

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the appellant request, direct, or demand that the Bank should act? A. T. Lawrence J. has found as a fact that he did. He says: "Did, then, the defendant request or direct the plaintiffs to permit the transfer of this stock to be made? If he did, he comes within the well-established doctrine expressed by Lord Davey in *Sheffield Corporation* v. *Barclay* (1) in these words." A. T. Lawrence J. then read part of the passage from Lord Davey's judgment set out above, and continued: "The Bank does nothing with regard to the transfer of stock until set in motion by some one. Its only duty is to permit a transfer to be made at the request or by the direction of the stockholder. It then prepares the transfer in the transfer books without charge. The stockholder can make the request either personally or by agent, and either expressly or impliedly. Did the defendant make it here and represent that he made it on behalf of the true stockholder? He says himself that he was instructed to prepare a transfer and to put a ticket forward. I think the drawing up of this ticket, the taking it to the Bank, the payment of 2*s*. 6*d*. to get the transfer expedited and made ready on the same day, the attendance at the Bank with the proposed transferor, and the identification of the forger as the stockholder constitute, when taken together, as distinct a request to permit the transfer to be made in the books as the 'demand to act' under the power of attorney did in the case of *Starkey* v. *Bank of England*." (2) He bases his finding on the accumulated facts there stated, and I see no object in discussing what would have been the case if this was an action against a person who had merely appeared to identify a transferor. I express no opinion on the point. But here the appellant is a broker whose ordinary course of business is to put forward transfers and carry them through. He is also on the Bank's list of privileged brokers, and as such knows that his identification will be accepted as sufficient. He puts forward the forger as the real Miss Pearson on the ticket in which he requests the Bank to prepare a transfer. He attends at the Bank on the execution of the transfer and identifies her, and otherwise acts for reward in the manner described by himself in his account as "attending at the Bank for the purpose of

(1) [1905] A. C. at p. 399. (2) [1903] A. C. 114.

transferring same," and in his book as "transferring India 3½ per Cent. Stock." He put forward and passed the transfer, using his privileged position to identify her.

It is to be observed that, although the law as stated by Lord Davey requires the bank or corporation acting to be under a duty to perform a ministerial act on request, it does not require that the person making the request should fill any particular position. (1) It is a question of fact in each case, and I entirely agree with the finding of A. T. Lawrence J. that the appellant did put forward the forger and request the Bank to accept and register the transfer signed by her. The fact that the defendant was one of the privileged brokers appears to me immaterial; it is a privilege granted to him on his own request and for his own benefit, and in no sense makes him the Bank's agent; and, if it does not amount to this, it seems to me useless as a defence. Nor does it appear to me material that the Bank in case of transfers over 2000*l.* takes further steps to ensure identity. The question is whether it can be said to be "default" on their part not to do so in the smaller cases. I understand the evidence in this case was that "where the amount is below that sum it is impracticable for the Bank to do so." (2) I understand that the number of transfers below 2000*l.* is so large and the necessity for expedition so great that it would be a serious impediment to business in general if such transfers could not be carried through with rapidity. But, however this may be, the finding that it is impracticable excludes any idea of default. A. T. Lawrence J. has also found that the appellant was agent in the matter for the alleged transferor and liable on that ground also. I express no opinion on this point, but I prefer to rest my judgment on the rule of law stated by Lord Davey and cited above.

Then it is said that the Bank has suffered no loss attributable to the appellant. It is contended that the forged transfer is a nullity (as it undoubtedly was), and that the Bank ought, and indeed were bound, to have treated it as such, and to have replaced Miss Pearson's name in their books as the holder of this specific stock. On the facts found by A. T. Lawrence J. this

(1) See [1905] A. C. at p. 400. (2) See [1907] 1 K. B. at p. 892.

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particular stock had passed before action from the original transferee to Messrs. Coutts, the bankers, and from them by sale on the Stock Exchange to Gibbs, a purchaser for value, whose name now stands in the Bank books as the holder on a transfer from Messrs. Coutts. It is plain, therefore, that the Bank are estopped from denying Gibbs' title, and could not remove his name mero motu. It is true that a title by estoppel is only good against the person estopped, and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title. What would have been Miss Pearson's strict rights, if she had brought an action against the Bank and Gibbs, it is not necessary to consider. There is, I believe, India 3½ per Cent. Stock existing to the extent of nearly seventy millions, and Miss Pearson's 1500*l.* differs in no respect from the remaining millions. Stock has no identity, and it is open to question whether the Court would compel the Bank to go through the form of taking off Gibbs' name in order to restore to her that particular 1500*l.* when she was offered the same sum bought in the market. (See the decree in *Barton* v. *North Staffordshire Ry. Co.*, set out in Seton on Decrees, 6th ed. vol. 3, p. 2308.) But, however that may be, I am of opinion that the wrong-doer, however innocent of wilful intention to do wrong he may be, has no equity to compel the Bank, whom he has deceived, or Miss Pearson, whose stock he has caused to be removed out of her name, to take any steps to assist him further to embarrass the Bank, to cast doubts on the title of all registered holders, or to try and throw the burden on an innocent person's shoulders. To hold the contrary might create that feeling of insecurity and uneasiness in the stockholders referred to in *Davis* v. *Bank of England* (1), where Best C.J. says: "But to prevent as far as we can the alarm which an argument urged on behalf of the Bank is likely to excite, we will say that the Bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the Bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the Bank, in the books which the law requires them to

(1) 2 Bing. 393, at p. 407.

keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the Bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the Legislature to give facility to the transfer of shares in the public funds." In my opinion the appeal fails and should be dismissed with costs.

KENNEDY L.J. read the following judgment:—Having had the opportunity of reading and considering the written judgment which has just been pronounced by Farwell L.J., I have only a few words to add to the expression of my concurrence in that judgment. It appears to me that upon the main question—the right of the plaintiffs to claim an indemnity from the defendant in respect of the liability of the plaintiffs to Miss Marian Pearson —the decisive issue is really an issue of fact; and the success of the defendant's appeal depends in regard to that main question argued before us upon his being able to satisfy this Court that the finding of A. T. Lawrence J. in regard to this issue cannot be supported on the evidence. We are bound to take the law as it has been laid down by the House of Lords in *Starkey* v. *Bank of England* (1), and later in *Sheffield Corporation* v. *Barclay*. (2) The application of that law to the present case hangs, I think, in the particular circumstances, upon the answer to one question—Is it true as a matter of fact that the defendant "requested, directed, or demanded of" the plaintiffs (to use the language of Lord Davey (3)) that they should permit the transfer in their books of the India stock which the true owner of that stock had not authorized? Or, to put the same question in a slightly different form, Did the defendant's conduct, as proved, in fact amount to such a request, direction, or demand? If the question ought to be answered, as my brother A. T. Lawrence has answered it, in the affirmative, then there is, in the circumstances of the present case, nothing upon which, so far as regards the plaintiffs' claim to indemnity,

(1) [1903] A. C. 114. (2) [1905] A. C. 392.
(3) [1905] A. C. at p. 399.

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the defendant can successfully seek to base a defence. It appears to me that the decision of the learned judge on this central issue is right. He has held that the proved acts of the defendant, which he sets forth (1), and of which the identification of the forger as the stockholder is only one, when fairly viewed together, do constitute such a request, direction, or demand. He was, I think, entirely justified in arriving at this result by considering those acts collectively and in the aggregate, and the inference of fact which he drew from such a consideration was, in my opinion, a legitimate inference. If this be granted, then upon the evidence there is nothing else which, according to the principles of the decision of the House of Lords, can properly be treated as wanting to the proof of the plaintiffs' right to indemnity. Upon the further question raised by the defendant's counsel as to the insufficiency of proof of actionable damage, I see nothing that I can usefully add to the judgment of A. T. Lawrence J. in the Court below and the judgment of Farwell L.J. in this Court.

Appeal dismissed.

Solicitors for plaintiffs: *Freshfields.*
Solicitors for defendant: *Christopher & Roney.*

(1) [1907] 1 K. B. at p. 906.

E. L.

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April 2.

Factory—Fencing of Machinery, Absence of—Person suffering bodily Injury —Offence—Limitation of Time for laying Information—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 135, 136, 146.

Sect. 10 of the Factory and Workshop Act, 1901, provides that a factory in which there is a contravention of the provisions of that section with regard to the fencing of machinery "shall be deemed not to be kept in conformity with" the Act, and by s. 135, if a factory is not kept in conformity with the Act, the occupier thereof shall be liable to a fine. By s. 136, if any person suffers any bodily injury in consequence of the occupier of a factory "having neglected to observe any provision" of the Act, the occupier shall be liable to a fine. Sect. 146 provides that the information for an offence under the Act shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed.

On January 21 the fact that certain machinery at the defendants' factory was unfenced, in contravention of s. 10, came to the knowledge of the inspector of the district. On July 31, in consequence of the machinery still being unfenced, a person suffered bodily injury. On October 24 an information was laid charging that, on July 31, the defendants' factory was not kept in conformity with the Act, whereby a person suffered bodily injury.

The magistrate dismissed the information on the ground that it was out of time, inasmuch as it had not been laid within three months of January 21:—

Held, that ss. 135 and 136 create separate and distinct offences; that the offence with which the defendants were charged was the offence under s. 136; and that, that offence having been committed on July 31, the information had been laid in time.

Rule nisi calling upon George Paul Taylor, Esq., one of the magistrates of the police courts of the metropolis sitting at the South Western Police Court, and Hugh Stevenson & Sons, Limited, to shew cause why the magistrate should not state a case for the opinion of the Court.

On October 24, 1907, an information was preferred by one Gailey, an inspector of factories and workshops, against Hugh Stevenson & Sons, Limited, the defendants, for that on July 31, 1907, a certain factory within the intent and meaning of the Factory and Workshop Act, 1901 (1), of which the defendants

(1) The Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10, sub-s. 1, contains provisions with respect to the fencing of machinery in a factory;

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were then the occupiers, was not kept in conformity with the Act—that is to say, certain machinery dangerous to persons employed or working there, to wit a certain platen machine, was not securely fenced as required by the Act, whereby a certain person named Jennie Flower suffered bodily injury.

On the hearing of the information it was proved that on January 21, 1907, the inspector Gailey visited the defendants' factory, and found that certain machines which under s. 10 of the Act ought to have been fenced were unfenced. Gailey thereupon cautioned the defendants' manager that the Act required the machines to be fenced. On July 31, 1907, one of the machines still remained unfenced, and in consequence Flower suffered bodily injury, her right hand being caught in the machine, with the result that she lost two fingers.

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and by sub-s. 2: "A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act."

Sect. 135: "(1.) If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding ten pounds and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than one pound for each offence."

Sect. 136: "If any person is killed or dies or suffers any bodily injury or injury to health, in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds . . . .

"Provided as follows:—

"(*b*) The occupier shall not be liable to fine under this section if an information against him for not observing the provision or regulation to the breach of which the death or injury was attributable has been heard and dismissed previous to the time when the death or injury was inflicted."

Sect. 146: "The following provisions shall have effect with respect to summary proceedings for offences and fines under this Act:—

"(1.) The information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed, or, in case of an inquest being held in relation to the offence, then within two months after the conclusion of the inquest, so, however, that it be not laid after the expiration of six months from the commission of the offence:"

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On behalf of the defendants it was contended that under s. 146, sub-s. 1, of the Act the information ought to have been laid within three months of the time when the fact that the machine was unfenced came to the knowledge of the inspector of the district and that the defendants could not be convicted.

The inspector submitted that the offence of having machinery unfenced was a continuing offence, and that in any case the prosecution was maintainable, inasmuch as the information was laid within three months of July 31, 1907, when the machine was unfenced.

The magistrate upheld the defendants' contention, and dismissed the information and declined to state a case.

Cecil Walsh, for the defendants, shewed cause. Under s. 146 of the Factory and Workshop Act, 1901, the information in the case of an offence under the Act must be laid within three months after the date at which the offence came to the knowledge of the inspector. In this case there was a failure to fence the machinery as required by s. 10, and, therefore, the defendants were liable under s. 135 to a penalty for the offence of not keeping the factory in conformity with the Act. The inspector knew of the absence of the machinery on January 21, and the three months, therefore, began to run from that date, and the magistrate rightly held that the proceedings were out of time. The fact that the absence of fencing caused a person to suffer bodily injury on July 31 does not render the defendants guilty of a fresh offence on that date. The Act nowhere makes it an offence to cause a person to suffer bodily injury. The offence with which the defendants were charged is that dealt with in s. 135 of failing to keep a factory in conformity with the Act. Under s. 136, if a person is killed or dies or suffers bodily injury in consequence of the occupier of a factory having neglected to observe the provisions of the Act, the occupier of the factory becomes liable to severer penalties than would otherwise have been the case, but the only object of that section is to increase the penalty, not to create a different offence, and that this is so clearly appears from the language of sub-s. (*b*) of s. 136. The provisions of s. 146 as to inquests also shew a clear distinction between

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the date of the commission of the offence and the date of the death.

[DARLING J. Suppose a person is injured through the absence of fencing and the occupier of the factory is summoned and fined and the injured person subsequently dies, can the occupier be further fined?]

Yes. The summons could be restored and a further penalty inflicted. Sect. 136, sub-s. (*b*), contemplates the possibility of further proceedings.

Rowlatt, in support of the rule. Sects. 135 and 136 are entirely distinct and deal with different matters. There may be cases under s. 136 where no offence is committed unless there is death or injury. Sect. 135 imposes a penalty for not keeping a factory "in conformity with" the Act. Those are technical words referring solely to s. 10 and other sections where those words are used. The language of s. 136 is different, for it deals with death or injury caused by a neglect to observe "any provision" of the Act. There are many provisions of the Act distinct from fencing, such as those in ss. 90—95, with regard to cotton cloth factories. A non-compliance with the provisions of those sections would not render the occupier of the factory liable to a penalty under s. 135 for not keeping the factory in conformity with the Act, for s. 95 provides its own procedure. This shews that the words "not kept in conformity" in s. 135 do not embrace everything brought within s. 136. The proviso to s. 136 strongly supports this view, for it shews that, where there is a prosecution under s. 136, a previous prosecution for a different offence may be pleaded as a defence, which could not otherwise be done. It follows that the offence in the present case was committed on July 31, and the proceedings were therefore in time.

LORD ALVERSTONE C.J. The question which we have to consider in this case is the construction of s. 146 of the Factory and Workshop Act, 1901, which provides that with respect to summary proceedings for offences under the Act "the information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district." That is

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a limitation clause, and it has been laid down many times that a limitation clause must be construed strictly. In the present case the inspector visited the defendants' factory on January 21 and then saw that the machinery in question was unfenced, and it is contended that the offence with which the defendants are charged then came to the knowledge of the inspector within the meaning of s. 146, and that the three months within which the information has to be laid therefore ran from January 21. The information was not in fact laid till October 24, and if the contention of the defendants is well founded it was out of time. In my opinion the question really depends on whether ss. 135 and 136 of the Act are sections dealing with the same offence, s. 136 merely adding a heavier penalty in the event of certain consequences resulting from the commission of the offence which is dealt with in s. 135. I must admit that I was for a time somewhat impressed with Mr. Walsh's argument, though I do not think he answered all the difficulties that lay in his way, for he was obliged for the purpose of his argument to contend that if a person had been fined under s. 135 for not keeping machinery fenced, and subsequently a person was injured through the machinery still being unfenced, the information could in some way or other be revived and a further and larger fine inflicted under s. 136. I know of no procedure by which that could be done, and my present view is that if proceedings are taken for an offence under s. 135, and are disposed of either by an acquittal or conviction, there is an end of the matter, and no further proceedings can be taken in respect of that particular matter. The question is, as I have said, do ss. 135 and 136 deal with the same offence? Sect. 135 imposes a fine if a factory is not kept in conformity with the Act, and in one sense it may be said that, whenever the occupier of a factory fails to comply with the statutory regulations or to provide things which the Act requires him to provide, he fails to keep his factory in conformity with the Act; for example, in the present case there was a contravention of s. 10 by reason of the failure to fence the machinery, and therefore the factory under that section is to be deemed not to be kept in conformity with the Act; it is not disputed that that was in itself an offence which could have been dealt with under

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s. 135. But I am satisfied with and accept the argument that s. 136 was intended to create fresh offences and that its operation is not limited to offences which can also be dealt with under s. 135.

Sect. 136 provides that "If any person is killed or dies or suffers any bodily injury or injury to health, in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds." The language of s. 136 is different from and wider than that of s. 135. Sect. 135 deals only with a factory or workshop which is not kept in conformity with the Act, whereas s. 136 introduces the non-observance by the occupier not only of any of the provisions of the Act, but also of the regulations made in pursuance of the Act. There is, further, the fact that the penalty imposed is much larger. Looking at s. 136 as a whole, I do not think it was intended merely to enable a larger fine to be imposed in the cases which are dealt with in s. 135. We have been referred to a group of sections in the Act, Nos. 90 to 95, containing provisions or regulations which the occupier of a factory has to observe relating to the temperature of factories, the provision of water, and matters of that sort to which the language of s. 135 is not applicable; and in those cases it seems to me that, if the provisions or regulations were not complied with and death or bodily injury resulted, there would be an offence which could only be dealt with under s. 136. In other words, I come to the conclusion that s. 136 does create offences in cases which would not of necessity be offences under s. 135. In the present case the offence charged against the defendants is that on July 31 their factory was not kept in conformity with the Act, whereby a certain person suffered bodily injury. In my opinion that offence is one dealt with by s. 136 and not by s. 135, and it follows that the three months' limitation does not run from January 21, but from July 31, and, therefore, the proceedings were commenced in time.

RIDLEY J. I am of the same opinion I entirely agree with the reasoning of my Lord, and I have very little to add. I think

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Ridley J.

the argument is well founded that the words "kept in conformity with this Act" in s. 135 are intended to bear a special meaning with reference to s. 10 and the other sections of the Act in which they occur. But apart from that argument, I should come to the conclusion that s. 136 creates an entirely distinct offence from that dealt with in s. 135; and I think there would be great difficulty in construing the Act otherwise. The language of s. 136 clearly points to the fact that it was intended to create a separate offence where death or injury resulted from the neglect to observe any provision of the Act or any regulation made in pursuance of it.

DARLING J. I am of the same opinion. I think the proviso (*b*) in s. 136 is very strong to shew that ss. 135 and 136 are dealing with entirely separate and distinct offences. There are throughout this Act a large number of different provisions and regulations which have to be observed by the occupiers of factories and workshops and the non-observance of which is made an offence. Then s. 136 creates another offence in different circumstances. It would seem that, but for the proviso (*b*) to s. 136, even the dismissal of a summons under s. 135 would not have prevented proceedings being taken under s. 136. That shews, I think, very clearly that the two sections are entirely distinct, because the proviso (*b*) was required to enable a person, who had been charged with an offence under s. 135 and acquitted, to plead that acquittal as a defence when charged with an offence under s. 136. I was for some time much impressed with Mr. Walsh's argument, but I could not, and cannot now, see how proceedings could be taken under s. 136, if there had already been proceedings under s. 135, unless a fresh summons were taken out. This consideration also supports the view that the two sections are dealing with separate offences. I come to the conclusion, therefore, that in the present case the question of time must be considered with regard to the offence created by s. 136, and the proceedings were therefore commenced in time.

Rule absolute.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for defendants: *G. Marris.*

1908
April 3.

PENNINGTON, Appellant *v.* PINCOCK, Respondent.

Licensing Acts—Intoxicating Liquor—Sale in marked Measure—"Long pull"—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 8.

By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. The appellant, who was the holder of an off licence for the sale of beer, was asked for a pint of beer by a customer. The appellant, in the presence and sight of the customer, twice filled a properly marked half-pint measure and poured the contents into a jug, which had been handed to him by the customer, and added a further quantity of beer to the jug from the tap. The jug, containing a pint and a gill of beer, was then handed to the customer, who paid the appellant the price of a pint of beer :—

Held that, as the pint of beer had been measured in a properly marked measure in the presence and sight of the customer, no offence had been committed under s. 8, and that the subsequent addition of a further quantity of beer was immaterial.

Addy v. *Blake*, (1887) 19 Q. B. D. 478, distinguished.

Case stated by justices for the Wigan petty sessional division of Lancashire.

An information was preferred by the respondent against the appellant under s. 8 of the Licensing Act, 1872 (1), charging that the appellant, on September 10, 1906, at Ince-in-Makerfield, in the county of Lancaster, did unlawfully sell intoxicating liquor, to wit beer by retail, not in cask or bottle, in a quantity more than half a pint in a measure not marked according to the imperial standard.

At the hearing of the information the following facts were proved or admitted :—The appellant was a grocer and provision dealer carrying on business at 148, Warrington Road, Lower Ince, in the county of Lancaster, and he was also the holder of an off licence in respect of the said premises for the sale of beer. The

(1) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 8: "Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards."

respondent was a superintendent of police in the said petty sessional division.

On September 10, 1906, one Ada Cockshott, acting upon the instructions of the respondent, entered the appellant's licensed premises, and, handing a jug to the appellant, asked him for a pint of beer. The appellant, in the presence and sight of Ada Cockshott, took a glass measure of the capacity of half a pint, properly marked according to the imperial standard, filled it twice, and each time poured the beer from the glass measure into the jug. The appellant then, in the presence and sight of Ada Cockshott, placed the jug with the beer therein under the tap and pumped into the jug an additional quantity of beer. The appellant then handed the jug and beer to Ada Cockshott, who paid the appellant for a pint of beer. There was then in the jug a pint and a gill of beer imperial standard measure.

A copy of a resolution passed by the justices at the last preceding general annual licensing meeting condemning the practice of giving the "long pull" had been served on the appellant.

On behalf of the appellant it was contended that there is sometimes a difficulty in measuring beer exactly in a marked measure owing to the froth on the beer, and that the object of the appellant in adding a small quantity after the beer had been poured from the measure into the jug was to make sure that the full quantity asked for was supplied; further, that, inasmuch as the beer was measured in a measure properly marked according to the imperial standard in the presence of the purchaser, the addition of the quantity added was not an offence, and that the appellant was entitled to add without measuring any quantity of beer, and that such an addition would not constitute an offence within the meaning of s. 8 of the Licensing Act, 1872.

It was established to the satisfaction of the justices that there was no difficulty in measuring beer exactly in a duly marked measure, and that the extra quantity was added in order to give the "long pull," and not to make sure that the full quantity asked for was supplied.

The justices were of opinion, first, that the beer supplied to Ada Cockshott should have been supplied to her in a measure of the denominational capacity representing the bulk demanded by

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her; and, secondly, that the appellant, by twice filling the smaller measure with beer and pouring the contents into the jug and superadding to the beer so in the jug the further unmeasured quantity of beer and then handing over to Ada Cockshott the jug and entire contents in exchange for the price of a pint of beer, was evading and acting in contravention of s. 8 of the Act, and they therefore convicted the appellant.

The question for the opinion of the Court was whether the justices were right in law in convicting the appellant.

Avory, K.C., and *Bonsey*, for the appellant. It is not an offence under s. 8 of the Licensing Act, 1872, to measure a pint of beer by means of a half-pint measure. The justices appear to have thought that the Act can only be complied with by using a measure of the same denominational capacity as the quantity asked for by the customer, but in some cases, as, for example, if a customer asked for a pint and a half of beer, that is obviously impossible. The beer was measured and poured into the jug in the presence and sight of the customer, and therefore no offence was committed. *Addy* v. *Blake* (1) is distinguishable, for there the customer did not see the beer drawn and never saw it whilst it was in the measure. If the beer was properly sold by measure it is immaterial that the appellant subsequently added a further quantity. Sect. 8 does not make the "long pull" an offence.

Overend Evans, for the respondent. The appellant was rightly convicted. There was no sale of beer until the jug was handed over to the customer. The sale was of the contents of the jug, and it was not a sale in a properly marked measure: *Payne* v. *Thomas*. (2) It is stated in Paterson's Licensing Acts, 18th ed. at p. 354, that under s. 8 a person may be convicted for selling by the "long pull."

LORD ALVERSTONE C.J. In my opinion this conviction cannot be supported. The object of s. 8 of the Licensing Act, 1872, is to secure that the purchaser of intoxicating liquor shall get full measure, and it is accordingly provided that all intoxicating

(1) 19 Q. B. D. 478. (2) (1890) 60 L. J. (M.C.) 3.

liquor sold by retail, and not in cask or bottle, shall be sold in measures marked according to the imperial standards. The facts found by the magistrates are that a customer of the appellant handed him a jug and asked to be served with a pint of beer. The appellant, in the presence and sight of the customer, twice filled a properly marked half-pint measure and emptied it into the jug. It is not an offence under s. 8 to measure a pint by means of a half-pint measure, and if the beer is measured into the jug in the presence and sight of the customer it is a sale by imperial measure. The question is when does the sale take place, and the facts of the present case distinguish it from *Addy* v. *Blake* (1), where the judgments of A. L. Smith and Wills JJ. were based on the fact that the customer in that case did not see the beer drawn and never saw it while it was in the measure, and there was no sale until the jug was handed over to the purchaser.

Another point taken on behalf of the respondent is that after the appellant had drawn and measured the pint of beer and had poured it into the jug he added a further quantity of beer to the contents of the jug. We are not concerned in this case with the question whether it is an offence to give what is known as the "long pull"; I am not aware of any enactment which makes it an offence. If the Act had been complied with as to the sale of beer by a marked measure, as in my opinion it had been, the subsequent addition of more beer is not an offence under s. 8. The appeal must be allowed and the conviction quashed.

RIDLEY and DARLING JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Neve, Beck & Kirby, for Albert E. Baucher, Wigan.*

Solicitors for respondent: *Snow, Fox & Higginson, for Harcourt E. Clare, Wigan.*

(1) 19 Q. B. D. 478.

F. O. R.

1908
April 8.

THE ROYAL COLLEGE OF VETERINARY SURGEONS, APPELLANTS *v.* COLLINSON, RESPONDENT.

Veterinary Surgeon—Qualified Person—Veterinary Surgeons Act, 1881 (44 & 45 *Vict. c.* 62), *s.* 17, *sub-s.* 1—*Use of Description by an unqualified Person stating special Qualification—"Canine Specialist."*

By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1, Any person not possessing the prescribed qualification who after December 31, 1883, "takes or uses . . . . any name, title, addition, or description stating that he is . . . . a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

The respondent, who was not possessed of the qualifications specified by the section, exhibited outside his residence a board with his name and the words "Canine specialist. Dogs and cats treated for all diseases":—

Held, that these words constituted a description stating that he was specially qualified to practise a branch of veterinary surgery, and that he was therefore liable under the section.

CASE stated by justices.

An information was preferred on behalf of the Royal College of Veterinary Surgeons against one Collinson for that he on January 15, 1908, at Kingston-upon-Thames, then not being on the register of veterinary surgeons and not holding the veterinary certificate of the Highland and Agricultural Society of Scotland, did unlawfully use and take an addition and description stating that he was specially qualified to practise a branch of veterinary surgery, contrary to s. 17 of the Veterinary Surgeons Act, 1881.(1)

Upon the hearing of the information the justices found that Collinson was not a member of the Royal College of Veterinary

(1) By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1: "If after the 31st day of December, 1883, any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description, stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine . . . . "

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Surgeons, and was not on the register of veterinary surgeons, and that he did not hold the veterinary certificate of the Highland and Agricultural Society of Scotland, and that on January 15, 1908, he exhibited outside his residence a board upon which were displayed the words "M. Collinson, canine specialist. Dogs and cats treated for all diseases."

The justices held that these words did not constitute an infraction of the Act and dismissed the information, but stated this case for the opinion of the Court.

Morton Smith, for the appellants. The justices were wrong. The object of the Veterinary Surgeons Act, 1881, appears from the preamble: "Whereas it is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses and other animals, to distinguish between qualified and unqualified practitioners." Then by s. 2 veterinary surgery is defined as "the art and science of veterinary surgery and medicine." Sect. 14 confirms the charters of the Royal College of Veterinary Surgeons, and in those charters the explanation of the expression veterinary college is found—"a school of veterinary art in which the anatomical structure of horses, cattle, sheep, dogs, and other domesticated animals, the diseases to which they are subject, and the remedies proper to be applied, are investigated and regularly taught." Sect. 16 deals with persons falsely representing that they are fellows or members of the college, and s. 17, under which this information is laid, with persons impliedly representing that they are specially qualified in veterinary surgery. The description given of himself by the respondent, "Canine specialist. Dogs and cats treated for all diseases," taken as a whole, comes within that section.

A man professing to keep a "veterinary forge" has been held to come within the section: *Royal College of Veterinary Surgeons* v. *Robinson*. (1) [He also cited *Royal College of Veterinary Surgeons* v. *Groves*. (2)]

The respondent did not appear.

(1) [1892] 1 Q. B. 557. (2) (1893) 57 J. P. 505.

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LORD ALVERSTONE C.J. It is unfortunate, I think, that this case has not been argued for the respondent, but I have a very strong view that this decision is wrong. It seems to me that the mischief aimed at by this Act appears in the preamble: "It is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses and other animals, to distinguish between qualified and unqualified practitioners." "Veterinary surgery" means the art and science of veterinary surgery and medicine. There is no definition of "veterinary," as far as I know, in this or any other statute. It seems to me that the object of the Act was that, in respect of animals who cannot speak for themselves, the people who are to treat them should be persons who have some recognized qualification. [His Lordship read s. 17, and continued:—] In my opinion that section deals with cases where the man does not call himself a veterinary surgeon, nor a practitioner of veterinary surgery, but where he indicates that he is specially qualified to practise the same by some addition to his name, or other description.

It is not unimportant to see that the charters were confirmed by this Act. The charters were charters for the establishment of the college; it is there expressed to be "a school of veterinary art, in which the anatomical structure of horses, cattle, sheep, dogs, and other domesticated animals, the diseases to which they are subject, and the remedies proper to be applied, are investigated and regularly taught." Therefore it seems to me, taking the Act and the charters together, that for the purpose of this Act the mischief aimed at is the misleading description by people as to their qualifications for treating animals, including dogs, and possibly cats, but certainly dogs.

The notice put up by the respondent was in these words, "M. Collinson, canine specialist. Dogs and cats treated for all diseases." It seems to me impossible to give to the words "canine specialist" the mere meaning that he is a judge of dogs, or that he is a breaker of dogs, or that he could tell the breed of dogs; to my mind it means canine specialist in reference to the words that follow. As I understand it, anybody would say, looking at this notice, "This man says he is a specialist in the

diseases of dogs." I cannot think there is any other meaning to be attached to those words, and, therefore, if, as I think, the Legislature meant to say that a person who indicates that he is specially qualified to practise the treatment of the diseases of dogs is not to do so unless he has obtained the necessary veterinary qualification, the respondent comes within the section. The section was intended to stop as far as possible persons from treating animals for diseases unless they are qualified veterinary surgeons and to prevent unqualified persons from treating them unless they really tell the public that they are not veterinary surgeons. It seems to me that the words in the notice before us do indicate that the respondent had the kind of qualification which the statute says a person must not indicate unless he has proper qualifications. Of course I am dealing only with the case of a man who practises for fees; I am not dealing with the case of a man who does so as an act of kindness or anything of that kind.

I myself think that this case is a much clearer infringement of the statute than was the case of *Royal College of Veterinary Surgeons* v. *Robinson*. (1) I doubt very much whether I should have decided that case in the same way. I should have thought that a man who put up "Veterinary forge" might very well be understood to mean merely that he was a good smith because he understands the structure and the anatomy of horses' feet. I only mention that because I do not in any way decide this case on the authority of *Royal College of Veterinary Surgeons* v. *Robinson*. (1) But I think this case is stronger. With regard to *Royal College of Veterinary Surgeons* v. *Groves* (2), that was the case of a man who held himself out as a chemist, who sold drugs. He did not suggest that he was going to treat the diseases; therefore that case is not in point. There is nothing in the authorities to indicate that I ought not to take the view I do, namely, that the respondent did mean to state to the public that he was specially qualified to treat the diseases of dogs, and I think that that was a direct infringement of the statute.

I understand my brothers do not entertain so clear an opinion

(1) [1892] 1 Q. B. 557. (2) 57 J. P. 505.

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upon the point, but holding this opinion I feel bound to express it.

RIDLEY J. I concur, but with hesitation, in the opinion of the Lord Chief Justice. With regard to the decision of *Royal College of Veterinary Surgeons* v. *Robinson* (1), that case seems to have been decided as it was because the Court thought that the words "Veterinary forge" implied that any person taking horses to the forge would get the benefit of veterinary skill and treatment for them. I do not think myself that I should so have understood those words; and I much doubt whether if that case had come before me I should have decided it in the same way. I ought not to say more than that. There it is; and, so far as it goes, it is an authority on the interpretation of this section. The case before us is a different one. The word "veterinary" nowhere appears in the description put forward by the respondent. I admit that that is not conclusive in his favour, because s. 16 deals with that. Sect. 17 appears to me to indicate that a person in order to offend against that section must put forward a description which is equivalent to a statement that he has got the skill of a veterinary surgeon. The words are, "any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same." It is quite true that the words do occur "or is specially qualified to practise the same," but I think those words must be read in conjunction with the preceding words and must be taken to mean a description indicating that he is specially qualified as a veterinary surgeon. They are in the same sentence, and it is clear that the section was passed with a view of preventing a person from practising as a veterinary surgeon unless he is one. That is what it comes to. The words "or is specially qualified to practise" are added out of caution in case there should be some mode found by persons of escaping from the previous more particular words.

In the present instance respondent's notice said "Canine specialist. Dogs and cats treated for all diseases." If I were

(1) [1892] 1 Q. B. 557.

asked when I saw a notice of this kind, "Do you think it is a veterinary surgeon who put up that notice?" I should say "Certainly not. If he were he would put up a very different notice. He is a quack; that is, he is a quack in the veterinary line. The same word that we use in regard to an unqualified surgeon or other doctor for human beings applies to this person as a doctor for dogs." But many a quack is a good doctor, and I suspect there is many a person who knows about dogs and their diseases and who gives them very good treatment, and who is a benefit to them, who is not a veterinary surgeon. I think we ought to be careful how we interfere with that. Sometimes it is a long way to where the veterinary surgeon's nearest place of abode is, and the wretched animal has to be taken a long distance. I am rather loth in any way to extend the operation of this Act of Parliament. I should be inclined to give it a narrower construction if I could do so, and to say that so long as a person does not pretend to a skill such as qualifies the real veterinary surgeon he ought not to be held to be within these provisions. However, my Lord thinks otherwise, and I suppose I am wrong in taking that view. The other view is this. The respondent has said here that he does understand about diseases of dogs, and therefore he says that he has a special knowledge of that subject. If that is the view that prevails with my Lord, I do not think myself strong enough to object to it.

DARLING J. I have come to the conclusion that this appeal should be allowed, though I confess with very great difficulty. The only words which seem to me to apply to this case are the words in s. 17, "specially qualified." The question for us is whether the notice put forward by the respondent does indicate that he is specially qualified. He does say that he is a "canine specialist." My brother Ridley says he would understand that to mean that he was a quack—a person practising without any veterinary qualification as a dog doctor. I suppose that is what most people would think. He claims to be a specialist to do with regard to dogs something which would cure them of diseases. That seems to me to come within the words of the section—

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Darling J.

specially qualified to practise veterinary surgery. I should have felt at liberty to take a different view, perhaps, if it had not been for the case of *Royal College of Veterinary Surgeons* v. *Robinson*. (1) If I had had to decide that case in the first instance, I should have had very great doubt whether the designation "Veterinary forge" was an offence within the section. I should have thought myself that it was merely a way of describing in rather high-flown terms a shoeing forge. But there is the case, and if that interpretation was put upon it in a weaker case than this I do not see how I can differ from the conclusion to which my Lord has come. If I could, I should do so.

Appeal allowed.

Solicitor for appellants: *G. Thatcher.*

A. P. P. K.

1908
April 13.

BIRSTALL CANDLE COMPANY *v.* DANIELS; SAUNDERS, CLAIMANT.

Practice—County Court—Execution—Warrant sent to Foreign Court—Binding the Property in Goods of Execution Debtor—Time—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 158—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 26.

Where a warrant of execution against the goods of a judgment debtor has been issued out of a county court and is sent by the high bailiff of that court under s. 158 of the County Courts Act, 1888, to the registrar of another county court for execution against the goods of the judgment debtor then within the jurisdiction of that other court, the time from which the writ of execution binds the property in those goods of the judgment debtor under s. 26 of the Sale of Goods Act, 1893, is the time at which the warrant of execution is issued by the registrar of that other court to the high bailiff of that court.

PLAINTIFF'S appeal from the Merthyr Tydvil County Court.

On July 18 the plaintiff obtained judgment against the defendant in the Dewsbury County Court. On the same day at 11.30 A.M. application was made by the plaintiff to the registrar of that court for the issue of execution against the goods of the

(1) [1892] 1 Q. B. 557.

defendant; a warrant of execution was issued, and was in the hands of the warrant officer of the Dewsbury County Court at 4.30 P.M. on July 18. The defendant had no goods within the jurisdiction of the Dewsbury County Court, but had some goods within the jurisdiction of the Merthyr Tydvil County Court, and, therefore, later in the day on July 18 the high bailiff of the Dewsbury County Court sent the warrant of execution, in accordance with the provisions of s. 158 of the County Courts Act, 1888 (1), to the registrar of the Merthyr Tydvil County Court requiring execution of the warrant against goods of the defendant then within the jurisdiction of that county court. The warrant was received by the registrar at Merthyr Tydvil on July 19, and goods of the defendant within the jurisdiction of the Merthyr Tydvil County Court were taken in execution under it.

The goods were claimed by the claimant, who was the trustee

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 158: "In all cases where a warrant of execution shall have issued against the goods and chattels of any person or an order for his commitment shall have been made, and such person, or his goods and chattels, shall be out of the jurisdiction of the court, it shall be lawful for the high bailiff of the court to send the warrant of execution or order of commitment to the registrar of any other court within the jurisdiction of which such person, or his goods and chattels, shall then be or be believed to be, with a warrant thereto annexed, under the hand of the high bailiff and seal of the court from which the original warrant or order issued, requiring execution of the same, and the registrar of the court to which the same shall be sent shall seal or stamp the same with the seal of his court and issue the same to the high bailiff of his court; and thereupon such last-mentioned high bailiff shall be authorized and required to act in all respects as if the original warrant of execution or order of commitment had been directed to him by the court of which he is the high bailiff, and shall within such time as shall be prescribed return to the bailiff of the court from which the same originally issued what he shall have done in execution of such process, and shall within such time as shall be prescribed, pay over all moneys received in pursuance of the warrant or order; . . . "

Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26: "A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same."

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of a deed executed by the defendant at 5.30 P.M. on July 18, by which the defendant assigned the goods to the trustee for the benefit of his creditors.

The high bailiff interpleaded, and on the trial of the issue the county court judge gave judgment for the claimant on the ground that, the deed of assignment having been executed before the warrant of execution was issued out of the Merthyr Tydvil County Court, the trustee had acquired a good title to the goods.

The plaintiff appealed.

Cavanagh, for the plaintiff. Under s. 26 of the Sale of Goods Act, 1893, a writ of execution binds the property in the goods of the execution debtor "as from the time when the writ is delivered to the sheriff to be executed," and it was decided in *Murgatroyd* v. *Wright* (1) that the effect of that section, as applied to execution in the county courts, is to bind the property from the time at which application is made for the writ. In this case, therefore, as the writ was applied for in the Dewsbury County Court before the execution of the deed of assignment, the trustee has no title to the goods as against the plaintiff, the execution creditor. It is immaterial that the warrant was subsequently sent to the Merthyr Tydvil Court for execution; that is only part of the machinery for executing the warrant.

John Sankey, for the claimant. The question is, Who was the person charged with the enforcement of the writ of execution? because s. 26 speaks of the writ being delivered "to the sheriff to be executed." The high bailiff of Dewsbury County Court could not execute it, because the debtor had no goods within the jurisdiction of that court. Therefore the warrant had to be sent to the Merthyr Tydvil Court, and before it could be enforced there the registrar of that court had, under s. 158 of the County Courts Act, 1888, to seal it with the seal of the court and then issue it to the high bailiff of the court. Until that had been done in the Merthyr Tydvil Court there was no one charged with the execution of the warrant, and it follows that the time at which the warrant was issued to the high bailiff of the Merthyr Tydvil Court is the time as from which the goods are bound;

(1) [1907] 2 K. B. 333.

but before that time had arrived the deed of assignment had been executed, and, therefore, the trustee had a good title as against the execution creditor. If the argument for the plaintiff is good, it follows that an execution issued out of one court might be ousted by the subsequent arrival of a warrant previously issued out of another court.

Cavanagh replied.

RIDLEY J. The question in this case arises under s. 158 of the County Courts Act, 1888, and s. 26 of the Sale of Goods Act, 1893, and in my opinion the county court judge came to a right decision. The warrant of execution was issued out of the Dewsbury County Court, and was in the hands of the high bailiff of that court, on July 18, before the time of the execution of the deed by which the judgment debtor assigned his goods to a trustee, the claimant, for the benefit of his creditors. The warrant was then transferred under s. 158 of the County Courts Act, 1888, to the Merthyr Tydvil County Court, and was issued to the high bailiff of that court on July 19. The question is which of those two issuings of the warrant is to be regarded as the crucial one for the purpose of s. 26 of the Sale of Goods Act, which provides that "a writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed." I think it is true to say that the warrant of execution was issued at Dewsbury, and that by means of another warrant which under s. 158 was annexed to it and sent with it to Merthyr Tydvil it was kept alive and issued again; though possibly it might be more correct to say that it was issued for the first time out of the Merthyr Tydvil County Court. But which of the two issues is the delivery to the sheriff within s. 26? But for the case put by Mr. Sankey, it might be that when the warrant was issued to the high bailiff of the Dewsbury Court he was charged with its enforcement, if there were any goods of the judgment debtor within the jurisdiction of that court, and, therefore, that he was the officer to whom the writ was delivered to be executed within s. 26. But what would be the position if, after the application

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Ridley J.

for the writ in the Dewsbury Court, an execution against the goods of the same judgment debtor had issued out of the Merthyr Tydvil Court under which the goods had been seized before the arrival of the warrant from Dewsbury? It is difficult to see how the Dewsbury warrant could then supersede the execution which was already in progress; and I think one can only deal with that difficulty by pointing out that a construction of the section which involves that difficulty is not the only possible construction. Further, under s. 158, before the warrant can be delivered to the officer of the foreign court for execution—that is, in this case, the Merthyr Tydvil Court—it has to be sealed or stamped with the seal of that court by the registrar, and then it is issued by him to the high bailiff; and therefore, for this reason also, I think that the true position is that although it is the original warrant that is ultimately issued out of the foreign court, yet it is not until it is issued out of that court that it can be said to have been delivered to the high bailiff to be executed so as to bind the goods of the judgment debtor under s. 26 of the Act of 1893.

I do not think that our decision in this case in any way affects the decision in *Murgatroyd* v. *Wright* (1), in which case the Court was not dealing with the questions that arise when a warrant of execution issued out of one county court is sent in accordance with s. 158 to be executed by another county court. For these reasons I am of opinion that this appeal must be dismissed.

DARLING J. I am of the same opinion. The question is as to the true meaning of the words of s. 26 of the Sale of Goods Act, "when the writ is delivered to the sheriff to be executed." These words are not on their face exactly applicable to the issue of process out of a county court, and in the case of *Murgatroyd* v. *Wright* (1), in which my brother Phillimore and I had to consider how those words were to be applied, we came to the conclusion that when all the proceedings in the execution are taken in the same county court the time when the application is made for the issue of the writ is the time from which the property in the goods of the judgment debtor is bound, because

(1) [1907] 2 K. B. 333.

that is the last act which has to be done by the suitor, the rest of the process of executing the warrant being carried out without any intervention on his part; but the language of the judgment in *Murgatroyd* v. *Wright* (1) goes no further than was necessary to deal with the case of an execution issued out of one court and completed in the district of that court; and the decision does not quite cover this case where a warrant was issued out of one court and was then sent to another court for execution. When, in that case, is it to be said that, in the language of s. 26, the writ was "delivered to the sheriff to be executed"? I doubt whether in the circumstances of this case the warrant can be said to have been delivered to the high bailiff of the Dewsbury Court "to be executed," because he can only execute warrants in his own district, and the goods of the judgment debtor were not in the Dewsbury district, but in the Merthyr Tydvil district. The warrant, therefore, had to be sent, under s. 158, to be issued out of the Merthyr Tydvil Court, and the warrant cannot be executed in the Merthyr Tydvil district until the formalities of s. 158 have been complied with—that is to say, the warrant has to be sent from the Dewsbury Court to the Merthyr Tydvil Court "with a warrant thereto annexed under the hand of the high bailiff and seal" of the Dewsbury Court, and then the registrar of the Merthyr Tydvil Court has to seal or stamp the warrant with the seal of his court and issue it to his high bailiff. In these circumstances I do not think that the reasoning which influenced us in *Murgatroyd* v. *Wright* (1) applies to the facts of this case; and in the case suggested by Mr. Sankey I can well imagine that the registrar of a county court might refuse to seal a warrant sent from another court, or to issue it to his high bailiff for execution, if its execution would conflict with an execution which had already issued out of his own court. These considerations, in my opinion, all tend to shew that in the circumstances of this case the writ was not "delivered to the sheriff to be executed" within the meaning of these words in s. 26 as applied to county court procedure until the warrant was issued out of the Merthyr Tydvil Court for execution by the high bailiff of that court. The trustee of the deed of assignment,

(1) [1907] 2 K. B. 333.

1908.

BIRSTALL CANDLE COMPANY v. DANIELS.

therefore, acquired a good title to the goods of the judgment debtor as against the plaintiff, and this appeal fails.

Appeal dismissed.

Solicitors for appellants: *Stacpoole, Batters & Stacpoole, for J. R. Smith, Leeds.*

Solicitors for respondent: *Smiles & Co., for J. B. Stephens, Cardiff.*

F. O. R.

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1908

April 30.

[IN THE COURT OF APPEAL.]

IVIMEY *v.* IVIMEY.

Practice—Order for Payment of Costs of Divorce Proceedings—Mode of enforcing Order—Action in King's Bench Division—Jurisdiction—Order XLII. *r.* 24 *—Order* LXVIII., *r.* 1.

An action in the King's Bench Division will not lie to recover a sum payable for costs under an order of the Divorce Court, but such order can only be enforced by the methods prescribed by the Divorce Rules and Regulations.

APPEAL from an order of Coleridge J. in chambers.

By an order dated February 19, 1908, made by the President of the Probate, Divorce and Admiralty Division in a wife's divorce suit, it was ordered that the respondent should within seven days from the service of the order pay to the petitioner the sum of 62*l.* 10*s.* 9*d.*, being the amount of the petitioner's taxed costs, and further that the respondent should within seven days lodge in court the sum of 60*l.* to cover the petitioner's costs of the hearing, or give security for the same as therein mentioned, and that all further proceedings should be stayed until the order was complied with. The husband not having complied with this order, the wife on March 6 commenced this action against him in the King's Bench Division by specially indorsed writ for 62*l.* 10*s.* 9*d.*, the amount of her costs, and applied for leave to sign judgment under Order XIV. The Master granted the application.

Coleridge J. in a considered judgment reversed the order of

the Master, and held that the action could not be maintained, on the ground, first, distinguishing *Norton* v. *Gregory* (1), that the order for payment of the costs was an order pendente lite and was consequently not an order to which Order XLII., r. 24, applied; and, secondly, that, even if the action would lie, such an action, having regard to the methods of enforcing the order under the procedure of the Divorce Court, would, under the circumstances of the case, be an abuse of the process of this Court.

The plaintiff appealed.

Stephen Lynch, for the plaintiff. The question is whether an action will lie in the King's Bench Division to recover costs ordered to be paid in a divorce suit.

No doubt this order might be enforced by a writ of fieri facias or by sequestration under the Divorce Rules, but the fact that the plaintiff has other remedies is not a reason for holding that this action does not lie. Order XLII., r. 24, provides that every order of the Court or a judge in any cause or matter may be enforced in the same way as a judgment, and a judgment might always be enforced by an action. In *Norton* v. *Gregory* (1) an order for the payment of the costs of an action in the Probate Division was held enforceable in this way, although that, no doubt, was a final order.

[COZENS-HARDY M.R. You cannot bring an action upon an order for alimony: *Bailey* v. *Bailey*. (2)]

That case is distinguishable, because there power was reserved to the Court to vary the order from time to time. It is a common practice to bring actions of this nature, and the object is to found a bankruptcy notice upon the judgment, inasmuch as an order for payment of the costs of a divorce suit is not a final judgment upon which a bankruptcy notice can be issued: *In re Binstead* (3); and this is frequently found to be the only effective method of obtaining payment of the costs of a divorce suit.

Hogg, for the defendant. No action will lie in the King's Bench Division (*a*) upon any order for costs incurred in a divorce suit; (*b*) upon an interlocutory order; (*c*) under the special

(1) (1895) 73 L. T. 10. (2) (1884) 13 Q. B. D. 855.
(3) [1893] 1 Q. B. 199.

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circumstances of this case. As to (*a*), prior to the Judicature Acts no action would lie upon an order as distinguished from a judgment, the reason being that the person in whose favour the order was made could proceed by way of application to the Court who made the order, and that to allow actions to be brought on such orders would tend to multiply actions unnecessarily: *Furber* v. *Taylor* (1), per A. L. Smith L.J. Then Order XLII., r. 24, came into force and made an order enforceable in the same way as a judgment, but that rule does not apply to divorce proceedings: Order LXVIII., r. 1. *Norton* v. *Gregory* (2) is not inconsistent with that, because the exceptions in Order LXVIII., r. 1, do not include proceedings in probate.

[COZENS-HARDY M.R. That explains a passage in Lord Esher's judgment in *In re Binstead* (3), where he says that the Divorce Court must enforce its order by its own procedure.]

In *Bailey* v. *Bailey* (4) the reasoning is similar. In *Godfrey* v. *George* (5), where an action was brought against a solicitor upon an order to pay the costs of an application to strike him off the roll, the judgment proceeded on the basis that such an application was not a criminal proceeding and was therefore not excepted from the Rules of the Supreme Court. Rule 24 of Order XLII. is the only rule by which an order can be enforced by action, and that rule does not apply to this case.

[He was stopped.]

Lynch replied.

COZENS-HARDY M.R. This is a case of importance, and we have had every possible assistance from counsel in dealing with it, but I think there is no ground for doubting that the decision of Coleridge J. was perfectly right. In proceedings in the Divorce Court an order was made that the respondent should pay a certain sum for the taxed costs of the petitioner and should give security for the petitioner's costs of the hearing, and that all proceedings should be stayed until the order was complied with. Now the consequence of an order for payment

(1) [1900] 2 Q. B. 719.
(2) 73 L. T. 10.
(3) [1893] 1 Q. B. 199.
(4) 13 Q. B. D. 855.
(5) [1896] 1 Q. B. 48.

of costs made in the Divorce Court is prescribed by the Divorce Rules and Regulations. Rule 179 says this: "This order shall be served on the proctor, solicitor, or attorney of the party liable, [or if it is desired to enforce the order by attachment on the party himself,] and if the costs be not paid within the seven days a writ of fieri facias or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order and non-payment." And by r. 203 such order may also be enforced by writ of elegit. That is to say, the person in whose favour the order is made can in case of default obtain an order of course in the registry giving him either a writ of fieri facias, or a writ of sequestration, or a writ of elegit. Until the Debtors Act, 1869, he could also have attached the party in default, but this can no longer be done as to the costs already incurred: see *Bates* v. *Bates*. (1)

The petitioner not being able, or thinking she was not able, to enforce the order in the manner prescribed by the rules or in accordance with the practice of the Divorce Court, has issued a writ in the King's Bench Division claiming the costs due and payable to her under the order I have referred to. The learned judge has held that no such action will lie. In my opinion that is correct. In the first place, this is not a judgment, it is a mere order, and it was the law before the Judicature Acts that, although you could bring an action on a judgment, you could not bring an action on an order of another Court; but Order XLII., r. 24, says that "every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." The effect of that is that for most purposes there is no difference between an order and a formal judgment in any case coming within that rule. I guard myself by saying that there may be a difference between an interlocutory order and a final order, but the mere fact that the Court has made an order and not a judgment does not prevent the Court from granting such remedy as it could formerly grant on a judgment. But that rule has no application whatever to the present case, because Order LXVIII., r. 1, says: "Subject to

(1) (1888) 14 P. D. 17.

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the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in" (inter alia) "proceedings for divorce or other matrimonial causes." Mr. Hogg's point is this, that Order XLII., r. 24, does not give any jurisdiction to the High Court to enforce by action any order in the Divorce Division, whether interlocutory or final, and I think that the authorities which he has cited bear out what appears to me to be the logical result and fair meaning and effect of Order LXVIII., r. 1, and Order XLII., r. 24. *Godfrey* v. *George* (1) was a case where a solicitor had been ordered to pay the costs of an application to strike him off the roll, and an action was brought to enforce that order. The Court of Appeal held that such an action could be maintained on the ground that a proceeding against a solicitor of that nature was not a criminal proceeding within Order LXVIII., r. 1, and consequently not excepted from the operation of the Rules of the Supreme Court, and was therefore a proceeding to which Order XLII., r. 24, applied. *Bailey* v. *Bailey* (2) is also, in my opinion, a strong authority to the same effect. It was there held that an order to sign final judgment under Order XIV. could not be made in an action for arrears of alimony payable under an order of the Divorce Division. Grove J. decided that the action would not lie, on the ground that the order was an interlocutory order. The Court of Appeal affirmed his decision, but they put it on a larger and wider ground. Lord Esher pointed out that the power to give alimony was conferred on a Court which was constituted by the Matrimonial Causes Act, 1857, and that the remedy intended to be given for disobedience to the orders of that Court was to be found in s. 52 of that statute, which provides for the enforcement of such orders in the same way as orders might be enforced in the Court of Chancery. It is quite true that that section has now been repealed by the Statute Law Revision Act, 1892, but that repeal is subject to the usual reservations contained in such Acts, and does not affect the remedies given by r. 179 to which I have already referred.

Then Lord Esher says this: "Would an action lie in a Court

(1) [1896] 1 Q. B. 48. (2) 13 Q. B. D. 855.

of Common Law to enforce a decree of the Court of Chancery? Clearly it would not, at least under ordinary circumstances. There was always power to sue upon the judgment of a Court of Common Law; but no promise could be implied at common law to obey a decree of the Court of Chancery; and therefore a remedy by action for disobedience to a decree of the Court of Chancery did not exist at common law, and a decree or order of the Divorce Division can be enforced only in the manner pointed out by s. 52. We go upon higher grounds than those stated in the Queen's Bench Division, but the reasons given by Grove J. are also weighty." Bowen L.J. gave judgment to the same effect, saying that "the only remedy for disobedience to an order for non-payment of alimony is that pointed out by 20 & 21 Vict. c. 85, s. 52." That being so, and there being no authority to the contrary, I think we must hold that no action can be maintained upon an order in the Divorce Division. I only wish to say in conclusion that our decision does not apply to an order made in the Probate Division, because proceedings in the Probate Division are not excepted from the rules by Order LXVIII., r. 1. I think that the judgment of Coleridge J. was right, and that the appeal should be dismissed.

KENNEDY L.J. I agree, and I desire to add a few words only. The learned judge has in my opinion rightly reversed the decision of the Master, who allowed these proceedings to go on; but I think it right to add that I am not entirely in agreement with the learned judge as to the grounds on which the judgment should be based. His reasons are, in the first place, that *Norton* v. *Gregory* (1) is different from the present case because the order in the present case is an order pendente lite; and, secondly, that, if this action could be maintained, it would, under the circumstances of the case, be an abuse of the process of the Court. I prefer to put my judgment upon the ground stated by the Master of the Rolls, namely, that, having regard to Order LXVIII., r. 1, Order XLII., r. 24, does not authorize an action to enforce a claim for costs under an order made by a judge in divorce proceedings, but that the process

(1) 73 L. T. 10.

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which ought to be followed in such cases is the process prescribed by the rules of that peculiar jurisdiction.

Appeal dismissed.

Solicitors: *G. R. A. Edmonds; Paterson, Candler & Sykes.*

H. B. H.

C. A. 1908 *May* 1.

[IN THE COURT OF APPEAL.]

LAZARUS *v.* SMITH.

Practice—Summary Judgment—Interest—Money-lender's Action—Defence under Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51)—*Admission of Balance remaining due on actual Advance—Order* XIV., *r.* 4.

Where the plaintiff in a money-lender's action applies for leave to sign final judgment under Order XIV., and the defendant sets up a defence under the Money-lenders Act, 1900, but admits that he still owes some part of the money actually advanced, the proper order is to order summary judgment for the amount admitted to be due without interest and to give leave to defend for the residue of the claim.

Wells v. *Allott*, [1904] 2 K. B. 842, explained and distinguished.

APPEAL from an order of Ridley J. in chambers.

The plaintiff, a money-lender, commenced this action by specially indorsed writ against the defendant as the maker of a promissory note for 295*l.* dated February 20, 1908, and claimed payment of the amount of the promissory note with 5 per cent. interest, and he applied for leave to sign final judgment under Order XIV.

It appeared from an affidavit filed by the defendant in opposition to this application that in February, 1907, he borrowed from the plaintiff the sum of 250*l.* and gave him a promissory note for the sum of 350*l.* payable by five instalments of 20*l.* payable each month from the 3rd of March to the 3rd of July, and one instalment of 250*l.*, the balance, payable on the 3rd of August, 1907. The defendant paid the first five instalments, 100*l.* in all, but was unable to pay the balance of 250*l.* The promissory note was renewed from time to time, and ultimately the defendant gave to the plaintiff the promissory

note mentioned in the writ. The defendant paid on these renewals 110*l.*, making a total of 210*l.* paid by him to the plaintiff. The defendant by his affidavit set up a defence under the Money-lenders Act.

The Master gave leave to the plaintiff to sign judgment for the sum of 40*l.*, being the amount admittedly due from the defendant in respect of the sum actually advanced, and gave leave to the defendant to defend for the residue of the claim and ordered the action to be placed in the short cause list for trial, and this order was affirmed by Ridley J. in chambers.

The defendant appealed.

Chaytor, for the defendant. In a money-lender's action, where the borrower sets up a defence under the Money-lenders Act, 1900, Order XIV. has no application: *Wells* v. *Allott.* (1) It is true that the only question there was as to the claim for interest, but the principle of that decision extends to the whole claim. In the present case the claim is for a lump sum for interest and principal, and the whole transaction will require investigation by the Court.

Samuel Moses, for the plaintiff. Assume everything against the plaintiff, assume that the money which the defendant has paid was paid entirely for principal, there still remains due from him a sum of 40*l.* in respect of the actual advance. Order XIV., r. 4, shews that summary judgment may be obtained in respect of part of the plaintiff's claim, and as regards the 40*l.* there is no scope for the operation of the Money-lenders Act. According to the statement in the Annual Practice, 1908, p. 127, the proper order where the total amount repaid to the money-lender is less than the sum actually advanced is to allow him to sign final judgment for the unpaid balance with 5 per cent. interest, giving the defendant leave to defend for the residue of the claim, but in this case no interest has been given.

Chaytor, in reply. In the Yearly Practice, 1908, p. 119, the learned authors express a doubt whether the practice of giving judgment for any part of the claim in a money-lender's action is justifiable, and submit that it is clearly wrong as regards the

(1) [1904] 2 K. B. 842.

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5 per cent. interest. [With reference to the scope of Order XIV. he cited *Roberts* v. *Plant* (1); *Lynde* v. *Waithman* (2); *Ochse* v. *Duncan*. (3)]

COZENS-HARDY M.R. In my opinion this appeal fails. I have no desire or intention to depart from one word that I uttered in *Wells* v. *Allott* (4), and in what I then said I was merely following and adopting the language of the then Master of the Rolls. I desire to make it quite clear that my view is that in any case in which an issue has to be decided under the Money-lenders Act that is a matter which ought to be dealt with at the trial of the action, and not by summary judgment under Order XIV. But what is the case here? This is a case in which the defendant admits that he received 250*l.* cash from the plaintiff. He asserts that he has paid 210*l.*—I care not whether for principal or interest, but he has paid 210*l.*—which leaves 40*l.* due from him, even if it be a loan which carries no interest at all. I take it, therefore, the defendant's affidavit is one in which there is a clean and clear admission by him that 40*l.* is still due from him to the plaintiff, and, that being so, I ask myself, What has the Money-lenders Act to do with the case? It seems to me to be exactly the same as if it were a case in which the plaintiff was not a money-lender, but there was a promissory note given for 250*l.*, and the defendant by his affidavit said, "I never got the 250*l.*; only 40*l.* was really advanced to me." In that case it seems to me it would be a matter of course that judgment should be entered for 40*l.*, and that leave to defend should be given as to the remainder. I should have felt great difficulty if the Master and the learned judge had given any interest on the 40*l.* There is no admission here of any interest at all, and it may well be that in determining the rate of interest to be allowed the amount of principal due under the promissory note will have to be investigated under the Money-lenders Act. Therefore, in my opinion, it will be wrong to make an order under Order XIV. for anything more than the admitted principal sum, and in that respect I think that the practice which apparently prevails in chambers of

(1) [1895] 1 Q. B. 597.
(2) [1895] 2 Q. B. 180.
(3) (1886) 3 Times L. R. 220.
(4) [1904] 2 K. B. 842.

giving the plaintiff judgment for the principal sum admitted to be due with 5 per cent. interest is wrong and ought not to be followed. Neither the Master nor the learned judge has done that in the present case, and I see no reason to doubt that the view they have taken is right. The order made simply deals with that which is admittedly due; and has nothing whatever to do with any transaction which comes within the purview of the Money-lenders Act. I think that this appeal must be dismissed with costs.

KENNEDY L.J. I entirely agree. It seems to me that, while it is our duty to maintain in all proceedings in which the Money-lenders Act comes into operation everything necessary to make the Act effective, it would be going beyond anything which that Act either demands or authorizes to say that Order XIV. does not apply to an admitted debt—a debt which is admitted quite irrespective of any matter with which that Act has to deal. Here the defendant is in a position in which he must admit that, even if this loan had been given without any terms as to interest, it has not been repaid to the extent of 40*l*. It cannot be right, if Order XIV. is to be used at all, to hold that, where there is an admitted debt as to part of the claim, r. 4 is not to apply, whether it is a money-lender's claim or the claim of any other creditor. The Money-lenders Act only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal. Here, admittedly, the defendant has received a sum in money and after being credited with all he has repaid he has to admit a balance of 40*l*. unrepaid. I agree with what the Master of the Rolls has said as to the note at p. 127 of the Annual Practice, and in my view the right course upon an application by a money-lender under Order XIV. is not to deal with the question of interest, which may be the subject of inquiry, and possibly of assessment, on another and less liberal scale, under the Money-lenders Act. Therefore the 5 per cent. mentioned in that note ought not to be allowed. The Order should only be used to the

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same extent as against any other debtor where a liquidated sum is indorsed on the writ and either the whole or a part of that sum is admitted to be due.

Appeal dismissed.

Solicitors: *Nicholson & Crouch; F. G. Emanuel.*

H. B. H.

1908 *April* 14.

[CROWN CASE RESERVED.]

THE KING *v.* BENSON.

Criminal Law—Indictment—Amendment of Count—Substitution of Allegation of Fraud for False Pretences—Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *s.* 1—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13, *sub-s.* 1.

There is no power to amend an indictment containing a count which charges the prisoner, under s. 13, sub-s. 1, of the Debtors Act, 1869, that in incurring a debt he obtained credit by false pretences, by striking out the allegations of false pretences from the count, and inserting therein an allegation that the prisoner incurred the debt by means of fraud.

CASE stated by the chairman of the Worcestershire Court of Quarter Sessions.

At the general quarter sessions of the peace for the county of Worcester held on April 6, 1908, the prisoner, John Henry Benson, was tried on the following indictment:—

Copy indictment. The jurors for our lord the King upon their oath present that John Henry Benson, on the 14th day of March in the year of our Lord 1908, unlawfully, knowingly, and designedly did falsely pretend to one Emma Ratcliffe that he the said John Henry Benson had then been sent for from Sheffield to work as a painter at the carriage works at Oldbury, meaning thereby, the railway carriage works at Oldbury belonging to the Metropolitan Amalgamated Railway Carriage and Waggon Company, Limited (Oldbury Works), that he the said John Henry Benson was then engaged to work as a painter at the railway carriage works at Oldbury aforesaid, and that he the said John Henry Benson then required board and lodging at Oldbury

aforesaid for the purposes of his said work by means of which said false pretences he the said John Henry Benson did then unlawfully obtain from the said Emma Ratcliffe six pounds weight of bread, four pounds weight of meat, one pound weight of potatoes, one pound weight of bacon, eight ounces weight of butter, two tame fowls' eggs, one ounce weight of cocoa, two ounces weight of tea, one pound weight of sugar, and two pairs of kippers with intent to defraud, whereas in truth and in fact he the said John Henry Benson had not then been sent for from Sheffield to work as a painter at the railway carriage works at Oldbury aforesaid, and whereas in truth and in fact he the said John Henry Benson was not then engaged to work as a painter at the railway carriage works at Oldbury aforesaid, and did not then require board and lodging at Oldbury aforesaid for the purposes of his said work, as he the said John Henry Benson well knew at the time when he did so falsely pretend as aforesaid against the form of the statute in such case made and provided and against the peace of our said lord the King, his crown, and dignity. And the jurors aforesaid upon their oath aforesaid do further present that the said John Henry Benson on the day aforesaid in the year aforesaid incurred a debt to the said Emma Ratcliffe amounting to the sum of five shillings and sixpence in the purchase of six pounds weight of bread, four pounds weight of meat, one pound weight of potatoes, one pound weight of bacon, eight ounces weight of butter, two tame fowls' eggs, one ounce weight of cocoa, two ounces weight of tea, one pound weight of sugar, and two pairs of kippers from the said Emma Ratcliffe. And the jurors aforesaid upon their oath aforesaid do further present that the said John Henry Benson on the day aforesaid in the year aforesaid in incurring the said debt of five shillings and sixpence unlawfully, knowingly, and designedly, &c. [repeating the allegations of false pretences contained in the first count], against the form of the statute in such case made and provided and against the peace of our said lord the King, his crown, and dignity.

It was proved that the prisoner went to the house of the prosecutrix on Saturday, March 14, 1908, and stated that he had been sent for from Sheffield to work at the carriage works at

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Oldbury, and that the prosecutrix stated she was surprised to hear that, as they were discharging on Saturday some of their workmen. The prosecutrix asked the prisoner, "Shall I keep you or will you keep yourself?" Prisoner said, "If you will keep me till Monday, I will settle then." The prosecutrix thereupon took the prisoner into her house and supplied him with board and lodging. On Monday he went out, and on his return told her he had to go again on Tuesday. On Tuesday he went out, and came back at night and told her that he had been to work, and would have to go at breakfast-time next day. He stayed with the prosecutrix until Saturday morning. From something that the prosecutrix heard she went to the police and asked for a warrant. A warrant was accordingly issued and was produced by the police and put in.

The prosecutrix, on being asked by the Court why it was she accepted the prisoner as a lodger and provided him with food, replied, "I took him in because I believed him to be straightforward. I believed everything he told me. He had no tools with him when he came." The prosecutrix added, "Although I knew they were discharging people from the carriage works, I believed he was going to work there. I supplied him with food because he asked me to keep him and stated he would settle up on Monday. He said he was going to work at the carriage works, not that he was engaged to work there." She added that she gave him board and lodging because she believed he told the truth. It was proved that the prisoner had not been sent for from Sheffield by any one at the carriage works, but he alleged, and it was not denied, that he heard in Sheffield that painters were wanted at the carriage works, and therefore he came. The prisoner did not get any work at the carriage works, although he applied for work there, but got other work at Dudley to which he went every day, and he was coming back from this work to the prosecutrix's house when he was arrested on the charge of obtaining board and lodging by false pretences.

Having regard to the specific false pretences laid in the indictment, and to the evidence of the prosecutrix that she gave board and lodging on the faith of the prisoner's statement,

not on the faith of such false pretences, but relying on the statement that he would settle up on the Monday, which was not one of the false pretences charged in the indictment, and which was not a false representation of an existing fact, the chairman held that the prosecution had failed to prove the first count of the indictment and there was no evidence to go to the jury on that count.

The prosecution thereupon stated that they relied on the second count of the indictment, which was framed under s. 13 of the Debtors Act, 1869, which enacts that "Any person shall in each of the cases following be deemed guilty of a misdemeanour . . . . that is to say, (1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud," and that the case on this count ought to go the jury.

The chairman held that, as the prosecution had failed to prove the false pretences in the first count, they could not, by repeating them in the second count and merely changing the allegations from false pretences to obtaining goods by fraud, when it was proved that the prisoner had not obtained credit by any of the allegations alleged, but by another false statement which was not in the indictment—namely, that he "would settle on Monday"—obtain a conviction on that count.

The prosecution thereupon asked the chairman to amend the indictment by striking out the whole of the false pretences as alleged and making the second count read as follows: "And the jurors aforesaid upon their oath aforesaid do further present that the said John Henry Benson on the day aforesaid in the year aforesaid incurred a debt to the said Emma Ratcliffe amounting to the sum of five shillings and sixpence in the purchase of six pounds weight of bread, four pounds weight of meat, one pound weight of potatoes, one pound weight of bacon, eight ounces weight of butter, two tame fowls' eggs, one ounce weight of cocoa, two ounces weight of tea, one pound weight of sugar, and two pairs of kippers from the said Emma Ratcliffe. And the jurors aforesaid upon their oath aforesaid do further present that the said John Henry Benson on the day aforesaid in the year aforesaid incurred the said debt of five shillings and sixpence by means

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of fraud against the form of the statute in such case made and provided and against the peace of our said lord the King, his crown, and dignity."

The prosecution contended that all the other averments in the indictment were surplusage, and that it was sufficient to charge a man with obtaining credit by fraud to bring him within the statute.

The chairman was of opinion that he had no power to amend, and that the statement of the precise fraud charged was material and not surplusage, as it was necessary in the indictment not merely to charge fraud generally, but to allege some specific fraud, so that the prisoner might know the case he had to meet; but at the request of the prosecution he consented to amend the indictment as above stated and to leave the case to the jury, subject to a case being stated for the Court for the Consideration of Crown Cases Reserved as to whether he had power to amend the indictment, and whether the indictment when so amended was good in law. He directed the jury that, assuming the indictment as amended was good in law, if they were satisfied that the representations which the prisoner made to the prosecutrix were wholly false and that he led her to believe that he was working at the carriage works when he was not working there while he was working elsewhere, and that he, knowing that she was supplying him with food and lodging on the faith of such belief, omitted to tell her that he was at work at another place, that was such fraud as would entitle them to convict the prisoner.

The jury found the prisoner guilty, and as he was unable to find bail he was detained in custody and the sentence deferred until the opinion of the Court for the Consideration of Crown Cases Reserved had been obtained upon the following points: First, Was there power to amend the indictment by striking out the whole of the allegations in the second count as surplusage? Secondly, Was the indictment as amended good in law? Thirdly, Was the chairman right in directing the jury that, if they believed the statements of the prisoner were false in fact, they could convict him of incurring a debt by fraud although the statements did not amount in law to false pretences, and it had

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been proved that none of those that were alleged were the specific grounds on which the person obtained credit?

If the Court were of opinion that all the above questions should be answered in the affirmative the conviction was to stand, but if any of them were answered in the negative the conviction was to be quashed.

Marchant, for the prisoner. There was no power to make the amendment. The effect was to insert a fresh count in the indictment, which had not been before the grand jury. In an indictment under s. 13, sub-s. 1, of the Debtors Act, 1869, a charge of obtaining credit by fraud would have to be made in a separate count from that which charged the prisoner with obtaining credit under false pretences. *Wilkes's Case* (1) shews that there is no power to make the amendment at common law. Nor is there any statutory power. Neither the Criminal Law Act, 1826 (7 Geo. 4, c. 64), the Criminal Procedure Act, 1846 (11 & 12 Vict. c. 46), the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), nor the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), which are the statutes dealing with amendments, give the power to substitute by that means a fresh offence in the count. The amendment was not an amendment in the "name or description of any matter or thing" within the meaning of s. 1 of the Criminal Procedure Act, 1851. *Reg.* v. *Garnham* (2) is the authority bearing most closely upon the question, although the point was not expressly decided, as the Court, without deciding whether there was power to do so, refused to make the amendment. In the present case the first count is drawn under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 88, but that count has no bearing upon the point before the Court. [*Reg.* v. *James* (3), *Reg.* v. *Bell* (4), *Reg.* v. *Pierce* (5), *Reg.* v. *Wright* (6), and *Reg.* v. *Bailey* (7) were also referred to.]

Cotes-Preedy, for the prosecution. There is power to make the amendment under s. 1 of the Criminal Procedure Act, 1851.

(1) (1770) 19 St. Tr. 1075.
(2) (1861) 8 Cox, C. C. 451.
(3) (1871) 12 Cox, C. C. 127.
(4) (1871) 12 Cox, C. C. 37.
(5) (1887) 16 Cox, C. C. 213.
(6) (1860) 2 F. & F. 320.
(7) (1852) 6 Cox, C. C. 29.

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The amendment did not alter the quality of the offence. The decision in *Reg.* v. *Pierce* (1) shews that it is not necessary to set out the false pretences, and the evidence before the grand jury would have been the same if the count as amended had been before them. The count contained a charge of misdemeanour, before and after amendment. The indictment was amended in the name or description of a "matter or thing" within the meaning of s. 1 of the Criminal Procedure Act, 1851. The allegations of false pretences were immaterial, as it was unnecessary to set them out, an allegation that the debt was incurred by means of fraud being sufficient. The prisoner was not in any way damnified, as the evidence remained unaltered. *Reg.* v. *Wright* (2) is distinguishable. In that case the amendment would have reduced a charge of felony to one of misdemeanour.

LORD ALVERSTONE C.J. In this case the prisoner was indicted, in the second count of the indictment, under s. 13, sub-s. 1, of the Debtors Act, 1869, which enacts that a person shall be guilty of a misdemeanour if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud. The first count in the indictment charged the prisoner with obtaining various articles by false pretences, but it is only the second count with which we have to deal. The latter words of s. 13, sub-s. 1, of the Act of 1869, "or by means of any other fraud," have for many years been treated as constituting a different kind of offence from that of false pretences. The decision in *Reg.* v. *Jones* (3) shews that a person may be convicted of obtaining credit by means of fraud within the meaning of s. 13, sub-s. 1, of the Debtors Act, 1869, although he has made no false pretence.

In the present case the chairman of the Court of quarter sessions ruled that there was no evidence for the jury of the false pretences charged in the indictment. An application was then made on behalf of the prosecution that the second count should be amended by striking out all the allegations of false

(1) 16 Cox, C. C. 213. (2) 2 F. & F. 320.
(3) [1898] 1 Q. B. 119.

pretences set out and inserting in their place "by means of fraud." The question before us is whether there was any power to so amend the indictment, and that question raises a very important point. If the second count as amended had originally gone before the grand jury it may be that upon the same evidence as was given at the trial the prisoner would have been convicted of incurring a debt by fraud, although no evidence of a false pretence was given. But the question is whether there was power to make the amendment. It is true that the evidence may be the same whether the amendment were made or not. But in my judgment there was no power to make the amendment. The principle involved is very important, because if the Court, by means of the amendment, allowed the prisoner during the trial to be charged with an offence different from that for which he was originally indicted, the power to amend would be considerably strained. There is no power at common law to allow such an amendment, and if the power exists it can only be by virtue of s. 1 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100). On behalf of the prosecution the words in that section which allow amendment, "in the name or description of any matter or thing whatsoever," were relied on. Whatever latitude ought to be given to those words, it is necessary for the prosecution to contend that by virtue of the words in s. 1 of the Criminal Procedure Act, 1851, allowing an amendment to be made "in the name or description of any matter or thing . . . . or in the ownership of any property named or described," it is lawful for the Court to make an amendment substituting in the indictment one offence for another. If the Legislature had intended that one offence might be substituted for another, it would not have used language similar to that under which it allows an amendment to be made with regard to some variance in the ownership of property named or described in the indictment. The procedure in a criminal trial assumes that the bill of indictment has gone before the grand jury and that they have returned a true bill. To allow an amendment to be made substituting a fresh offence might have the effect of placing a prisoner upon his trial for an offence that had never been before the grand jury. The fact that the

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evidence may be the same to establish both cases is immaterial. There is no power to make an amendment substituting one offence for another. I am therefore of opinion that there was no power to make the amendment, and that the conviction must be quashed.

RIDLEY, DARLING, BRAY, and SUTTON JJ. concurred.

Conviction quashed.

Solicitors for prosecution and prisoner: *Blundell, Gordon & Co., for S. Thornley, Worcester.*

J. E. A.

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April 29.

[IN THE COURT OF APPEAL.]

HUGGETT *v.* MIERS.

Negligence—Dangerous Premises—Building let out in Flats—Staircase in Possession of Landlord—Staircase not Lighted—Landlord, Liability of, to Persons other than Tenants—Absence of any Undertaking to light Staircase.

The defendant was the owner of a building, the different floors of which were let by him as separate offices to different tenants, the staircase by which access to them was obtained not being let, but remaining in the legal possession of the defendant. The agreements for the letting of the offices respectively contained no provision with regard to the lighting of the staircase. The tenants respectively had gas lights on the landings outside the entrances to their respective offices, which were supplied with gas from their own meters, and the practice was that each tenant on leaving his office for the night turned off his own light, but it did not appear that there was any agreement between the defendant and the tenants that they should light the staircase. The plaintiff, who was in the employ of one of the tenants, upon coming down the staircase from his employer's offices on an evening in March at 8.15, when, all the lights having been put out, the staircase was in darkness, failed to find his way out through the street door into the street, and, going further down the stairs towards the basement, fell through a door opening upon a flagged courtyard at some distance above the level of the flagstones. This door was used for hoisting goods into and out of the building. In an action brought by the plaintiff against the defendant in respect of injuries resulting from the fall:—

Held, that there was no duty towards the plaintiff imposed upon the

defendant to light the staircase, and consequently the action was not maintainable.

Miller v. *Hancock*, [1893] 2 Q. B. 177, discussed and distinguished.

APPLICATION by the plaintiff for judgment or a new trial in an action tried before Channell J. with a jury.

The action was to recover damages for personal injuries sustained by the plaintiff in the manner after mentioned.

The defendant was the owner of a building situated in a street in Leeds called New Briggate, the different floors of which he let separately as offices to different tenants. The common staircase by which access was obtained to the different floors was not let, but remained in the legal possession of the defendant. The agreements for letting the offices respectively did not contain any provision with regard to the lighting of the staircase. The defendant supplied no light for the staircase. Each of the tenants had a gas light on the landing on which his offices were situated outside the entrance to them, which light was supplied with gas from his meter, and the practice was that each tenant, when he left for the night, turned off his own light; but it did not appear that there was any agreement between the defendant and the tenants that they should light the staircase. The plaintiff was employed as a canvasser by a firm called A. & G. Taylor, who had offices on the second floor of the building. In the evening of March 9, 1907, the plaintiff had occasion to go to the offices of his employers, where he had been several times before, at about 6.30, and he remained there till about 8.15. A woman who was employed as caretaker there left before the plaintiff, and, on leaving, had turned out the light on the landing, and, all the other tenants having previously gone for the night, when the plaintiff came out the staircase was in darkness. He groped his way down the staircase with his hand on the banisters. There was some conflict of evidence as to whether the door leading into the street was then open or not. However that might be, the plaintiff did not find his way through it; and, going further down the staircase towards the basement, he came upon a door opening upon a flagged courtyard at some distance above the level of the flagstones, which door was used for the purpose of hoisting goods into and out of the building, and, pushing the door open,

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he straightway fell into the yard below, thereby sustaining serious injuries. The action was subsequently brought by the plaintiff against the defendant, alleging that under the circumstances there was a duty on the part of the defendant towards the plaintiff to keep the staircase sufficiently lighted, and a breach of the duty, which led to the accident. In summing up the case to the jury the learned judge told them, in substance, that in his opinion there was no duty imposed upon the defendant to light the staircase, but that he should leave the case to them to avoid the necessity for a new trial in case the Court of Appeal did not agree with his view. (1) The jury found a verdict for the defendant.

E. T. Atkinson, K.C., and *H. S. Cautley*, for the plaintiff. The learned judge misdirected the jury by telling them that there was no duty cast upon the defendant to light the staircase. His direction in this respect was inconsistent with the judgment of the Court of Appeal in *Miller* v. *Hancock*. (2) It was there held that, under similar circumstances, it was the duty of the landlord to keep the staircase reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants. It is true that in that case the question was as to the duty to repair, whereas here it is as to the duty to light the staircase, but it is submitted that the same principle applies to both cases. Proper lighting after dark is as essential to keeping the staircase reasonably safe as proper repair. The duty was based in the case of *Miller* v. *Hancock* (2) on the fact that the landlord retained possession of the staircase, and must have contemplated that it would be used by the tenants and persons having business with them as being the only means of access to their offices. The staircase may be said in such a case to be provided by the landlord for that purpose; and under these circumstances there

(1) The learned judge suggested to the jury that they should find a verdict on certain specific questions, but the jury, instead of doing so, merely returned a general verdict for the defendant, and apparently they were not afterwards asked to further consider their verdict.

(2) [1893] 2 Q. B. 177.

is a relation at common law between him and members of the public resorting to the tenant's offices from which a duty arises on his part to keep the staircase reasonably safe.

[SIR GORELL BARNES, PRESIDENT. In *Miller* v. *Hancock* (1) the duty to the plaintiff appears to have been based upon an implication that the landlord had contracted with the tenants to keep the staircase in repair. In the present case any implication that the landlord had undertaken to light the staircase appears to be negatived by the fact that the tenants respectively maintained the lights on their respective landings.]

The obligation of the landlord was apparently held in *Miller* v. *Hancock* (1) to arise as a necessary consequence from the relation between the tenants and the landlord, who had let the offices to them, retaining the staircase, which was the necessary means of access to their offices, in his own possession. The mere fact that the tenants in this case had in fact for their own convenience maintained lights outside on their respective landings ought not to be treated as rebutting the implication of an undertaking by the landlord to do all that was necessary for the safety of the staircase. Even assuming that there was no implied contract by the landlord with the tenants to light the staircase, the judgments in *Miller* v. *Hancock* (1) seem to shew that there was a duty towards members of the public using the staircase for the purpose of access to the offices of the tenants, independently of any contract with the tenants to keep the staircase reasonably safe. [They also cited *Smith* v. *London and St. Katharine Docks Co.* (2)]

Waugh, K.C., and *J. A. Compston*, for the defendant, were not called upon to argue.

SIR GORELL BARNES, PRESIDENT. This is an application by the plaintiff for a new trial on the ground of an alleged misdirection by the learned judge in the course of summing up the case to the jury. It is necessary to state the facts, which are very simple, in order to appreciate the nature of the alleged misdirection. The defendant was the owner of premises situated in New Briggate, Leeds, the different floors of which he let to

(1) [1893] 2 Q. B. 177. (2) (1868) L. R. 3 C. P. 326.

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different tenants as offices. The common staircase, by means of which access was obtained to the different offices occupied by the tenants respectively, was not let. Among the tenants was a firm of A. & G. Taylor, who occupied rooms on the second floor as offices. The plaintiff, who was a canvasser for that firm, went to their offices, where he had been several times before, on the evening of March 9 in last year, and stayed there till 8.15 P.M. When he left, the staircase was in darkness, and he descended from the second floor feeling his way with his hand on the banisters. There was some conflict of evidence as to whether the door leading into the street was then open or not. However that might be, he did not go out through that door, but went some steps lower down the staircase, and, pushing open a door which he found, fell into a court-yard, sustaining serious injuries. A fact of importance in this case is that the lights on each of the landings of the staircase were not in fact supplied by the landlord, but it appears that the tenants respectively had gas jets on the outside of the entrances to their offices on their respective landings, which were supplied with gas from the meters belonging to the tenants respectively, and were controlled by them; and the practice seems to have been that each of the tenants put out the light on his landing on leaving for the night. On the evening in question the caretaker at Taylors' offices left before the plaintiff, and, on leaving, turned out the light on their landing, and, all the other lights having been previously turned out, the staircase was, as I have said, in darkness when the plaintiff left and groped his way down the staircase, with the result which I have already mentioned. The learned judge left the case to the jury, but indicated to them that, in his opinion, there was, under the circumstances, no duty towards the plaintiff imposed upon the defendant to light the staircase. He asked the jury to find on specific questions, but they returned a general verdict for the defendant. Of that direction by the learned judge the plaintiff complains.

It is argued for the plaintiff that, upon the facts of this case, there was a duty towards the plaintiff imposed upon the defendant to light the staircase, and a breach of that duty which led to the accident to the plaintiff. The question is whether there

was such a duty. It was contended that the case stood on the same footing as *Miller* v. *Hancock* (1), and therefore was governed by the decision in that case, and that the learned judge in his summing up had not acted on the doctrine there laid down. In my opinion that case is not an authority which governs the present case. I approach the question from the following point of view. It is clear that, as a general rule, the grant of an easement imposes no obligation on the owner of the servient tenement to do anything in the nature of repair. Anything that may be requisite for the enjoyment of the easement by way of repair must be done by the owner of the dominant tenement for himself; but the statement of the law on the subject by Lord Mansfield in *Taylor* v. *Whitehead* (2), which was referred to by Bowen L.J. in *Miller* v. *Hancock* (3), is to the effect that, though by the common law he who has the use of a thing ought to repair it, the grantor may bind himself. Therefore we start in such a case with the position that, unless there be circumstances which point to the contrary conclusion, any repair of the staircase, which may be necessary, would have to be done by the tenants. It was, however, pointed out in *Miller* v. *Hancock* (1) that there may be cases in which, either by express agreement or by necessary implication, the landlord of premises, let as these were, contracts with the tenants to do any repairs which may be necessary to the staircase, or possibly to do something more than repairs; but it appears to me that, unless such a contract could be shewn to have been made by the landlord, either in express terms or by necessary implication, there would be no duty cast upon the landlord in such a case to keep the staircase in repair. If there were no such duty on the part of the landlord towards the tenants, I cannot see how there possibly could be such a duty towards an outsider who comes on the premises on the invitation of a tenant. Then does the decision in *Miller* v. *Hancock* (1) afford any ground for an implication that in this case the landlord undertook any duty towards the tenants or anybody else to light the staircase? I cannot see that it does. I think that the decision in that case must be regarded as confined to the

(1) [1893] 2 Q. B. 177. (2) (1781) 2 Doug., 4th ed. 745.
(3) [1893] 2 Q. B. 177, at p. 181.

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particular facts which there existed. All the judges in giving their judgments refer to the special circumstances of the case. It was held that under those circumstances there was a necessary implication that the defendant had agreed with the tenants to keep the staircase in repair, and, as the defendant must have known and contemplated that it would be used by persons having business with the tenants, there was an obligation on the defendant to keep it reasonably safe for the use of the tenants and those persons. The words "reasonably safe," as there used, meant, I think, "reasonably safe as regards the repair and condition of the material structure." That case is very different from the present. It may be that in such a case a person using the staircase might be entitled to assume that it was in a reasonably safe state of repair, and, as Bowen L.J. put it, that he would be "shielded by the responsibility of the person on whom the liability to repair the staircase may rest." But, as it seems to me, wholly different considerations apply to this case, where the implication suggested is that the landlord undertook to light the staircase. To my mind no implication can in such a case reasonably be made in favour of the plaintiff that the landlord undertook any obligation in respect of the lighting of the staircase. The practical differences between the two cases are obvious. In *Miller* v. *Hancock* (1) the person injured was regarded as using the staircase on the assumption, which he was entitled under the circumstances to make, that it was in a proper state of repair. In the present case, the staircase being pitch dark, the risk of using it without providing himself with any light was obvious to the plaintiff. Furthermore the facts, in my opinion, distinctly negative any implication that the landlord had undertaken to light the staircase, because each tenant lighted his own landing, and turned out his light on leaving for the night. It appears impossible under the circumstances to infer in favour of a person using the staircase by invitation of a tenant any undertaking on the part of the landlord to do what the tenants, as it would seem by arrangement with the landlord, undertook to do for themselves, and I cannot see how such a person could be in a better position in this respect than the

(1) [1893] 2 Q. B. 177.

tenant himself. Under these circumstances the case of *Miller* v. *Hancock* (1) does not seem to me to be on all fours with the present case; and I do not think that we should be warranted in extending the application of that decision to circumstances such as those with which we are now dealing. On these grounds I think the application must be refused.

FLETCHER MOULTON L.J. I am of the same opinion, and, after the full judgment which the President has delivered, I need only add a very few words. The only question in this case is whether there is any obligation imposed on the landlord of a building let out in offices, such as that in the present case, to light the staircase. The plaintiff's counsel contend that there is such an obligation, but I cannot myself see any ground for that contention, either on authority or in reason. It is obvious that in this case the different tenants to whom the floors of the building were respectively let never supposed that there was any obligation on the landlord to light the staircase. It is not suggested that there was any express undertaking by him to do so; but it is said that an undertaking to do so ought to be implied from the circumstances of the case. All I can say is that the inference which I draw from the circumstances is that it was never intended that the landlord should light the staircase. It was suggested by the plaintiff's junior counsel that, whatever the arrangement as to lighting between the landlord and the tenants may be, the landlord is in such a case under an obligation towards persons using the staircase as a means of access to the tenants' offices to keep it reasonably safe, and for that purpose to light it when it is dark—apparently all night, if necessary. I cannot see how such a duty can be supposed to arise. Take, for example, the case of a house which is let at the end of a private lane. Would it be the duty of the landlord towards persons seeking access to the premises to keep the lane lighted all night? I know of no authority at common law for a duty on the part of a landlord to provide artificial light in such a case. There is a very broad distinction between a case like the present and a case of non-repair of a staircase. If a staircase is dark, a person using

(1) [1893] 2 Q. B. 177.

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it must obviously be aware that it is in that condition; whereas in the case of a person using a staircase which is out of repair, as in *Miller* v. *Hancock* (1), it may not be obvious to him that it is so. In this case there is, as I have pointed out, no reason to infer that the tenants respectively, when they took their offices, ever supposed that the landlord intended to light the staircase. The case of *Miller* v. *Hancock* (1) appears to me to stand entirely on its own facts, and I confess that I do not feel quite clear as to the exact ground upon which it was decided. In my private opinion, looking at the judgments in that case, particularly that of Bowen L.J., which appears to me to be the most lucidly expressed, the ratio decidendi was as follows. The Court came to the conclusion that, as between the landlord and the tenants, the landlord had undertaken the obligation of keeping the staircase in a reasonably safe state of repair; and they considered that, under those circumstances, the landlord, by letting the different offices to the tenants, had authorized the tenants to invite persons to come to them for business purposes, and therefore to use the staircase; and the Court consequently ascribed to the landlord himself the invitation given by the tenant by his authority, and based upon that invitation, so ascribed to the landlord, a duty on his part towards those so invited to keep the staircase in a reasonably safe state of repair. If that be the ratio decidendi in that case, it can have no bearing on the present case, because it would be impossible to infer here that the landlord authorized the tenants to invite persons to use the staircase at any hour of the night, when it was in a state of darkness.

FARWELL L.J. I agree. It is well settled that at common law he who has the use of an easement must himself do any necessary repair. The authorities on the subject may be found collected in Gale on Easements, 7th ed. p. 449. But, as Lord Mansfield said in *Taylor* v. *Whitehead* (2), the grantor of an easement may bind himself to repair, either expressly or by necessary implication. In *Miller* v. *Hancock* (1) it was held that the landlord had by necessary implication so bound

(1) [1893] 2 Q. B. 177. (2) 2 Doug., 4th ed. 745.

himself. Bowen L.J. said in that case: "It was contended by the defendant's counsel that, according to the common law, the person in enjoyment of an easement is bound to do the necessary repairs himself. That may be true with regard to easements in general, but it is subject to the qualification that the grantor of the easement may undertake to do the repairs either in express terms or by necessary implication. This is not the mere case of a grant of an easement without special circumstances." The decision in that case rested on the conclusion of fact that there was by necessary implication under the circumstances an undertaking by the landlord of the obligation to keep the staircase in repair. Here we are asked to make a similar implication with regard to the lighting of the staircase. It is obvious that, in cases where the question is whether any and what implication of fact ought to be made, each case must depend on its particular circumstances. We are asked to infer here that the landlord has undertaken to keep the staircase lighted at all necessary hours, apparently during the whole night if necessary. Not only are there no facts, in my opinion, to justify such an implication, but what material facts there are appear to be directly contrary to it, inasmuch as the staircase is in fact lighted by gas jets which belong to the tenants respectively, and are supplied by gas from their meters. Under these circumstances to draw the inference that there was a contract by the landlord with the tenants to do the lighting would be, in my opinion, to infer something in direct contravention of the facts of the case. The only remaining question is whether, as suggested for the plaintiff, a member of the public who uses the staircase for the purpose of going to or from the offices of one of the tenants can have a greater right than the tenant himself. The case of *Miller* v. *Hancock* (1) was relied on as supporting that suggestion; but the whole reasoning of that case is based upon the implication of a contract by the landlord to keep the staircase in repair. Of course there could be no contract to that effect with the public at large, but the Court of Appeal apparently came to the conclusion that the action was maintainable by the following somewhat subtle line of reasoning: they

(1) [1893] 2 Q. B. 177.

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seem to have treated the landlord, who had, as between himself and the tenants, undertaken the duty of keeping the staircase in repair, as having authorized the tenants for the purposes of their business to invite members of the public to use the staircase on his behalf, so as to bind him. They appear to have reached that conclusion by the light of the judgment in *Smith* v. *London and St. Katharine Docks Co.* (1) I confess that the decision in that case does not seem to me applicable to the facts which existed in *Miller* v. *Hancock* (2); for in *Smith* v. *London and St. Katharine Docks Co.* (1) it was the dock company itself which carried on the business for the purposes of which they invited persons to use the gangway. I agree with the view taken by my brother Fletcher Moulton as to the reasoning on which the decision in *Miller* v. *Hancock* (2) was founded, but I altogether dissent from the contention of the plaintiff's counsel that, even if the implication of a contract by the landlord with the tenants made in that case cannot be made here, a member of the public using the staircase on the invitation of the tenant can have a greater right than the tenant himself.

Application dismissed.

Solicitors for plaintiff: *Rollit, Sons & Burroughs, for A. R. Lake, Wakefield.*

Solicitors for defendant: *Jaques & Co., for Scott & Turnbull, Leeds.*

(1) L. R. 3 C. P. 326. (2) [1893] 2 Q. B. 177.

E. L.

PAUL *v.* HARGREAVES.

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April 1.

Weights and Measures—Vehicle carrying Coal for Delivery—Person in charge of Vehicle—False Representation of Weight—Representation by Employer—Innocent Delivery by Servant—Mens rea—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.

By s. 29 of the Weights and Measures Act, 1889, an inspector may enter any building where coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or delivery to a purchaser, and may weigh any quantity of coal found in any such place or vehicle or which is in course of delivery to any purchaser; and if it appears to a Court of summary jurisdiction that any quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, is liable to a fine:—

Held, that to constitute an offence under this section on the part of a person in charge of a vehicle carrying coal for delivery a mens rea is necessary, and, consequently, that a servant in charge of a vehicle who was innocently delivering therefrom to customers coal of less weight than that represented by his employers, and who had himself no knowledge of any short weight, was not guilty of an offence under the section.

Case stated by justices.

At a petty sessions of the peace holden in and for the division of Wimbledon, in the county of Surrey, on October 2, 1907, Thomas Paul, hereinafter called the appellant, was charged by Harold Hargreaves, an inspector of weights and measures for the county of Surrey, hereinafter called the respondent, for that he the appellant on July 24, 1907, at Merton, in the said county, then being the person in charge of a vehicle, did unlawfully deliver coal to a purchaser in sacks labelled 1 cwt. each, and that the said sacks did not contain the weight thereon represented.

The information was laid under s. 29 of the Weights and Measures Act, 1889. (1) At the hearing the following facts were found:—

The appellant was a carter in the employment of Charles

(1) Weights and Measures Act, 1889:—

Sect. 29: "(1.) Any inspector of weights and measures or officer appointed for the purpose by the local authority may, at all reasonable times, enter any building or part of a building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle

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Gothard & Co., Limited, coal merchants, hereinafter referred to as the sellers. On July 24, 1907, he was in charge of a cart in course of delivering two tons of coal in sacks, each labelled 1 cwt. Twenty-six sacks of coal had already been delivered by the appellant when he was stopped by the respondent, who, on weighing the remaining fourteen sacks, found them 2, 3, 5, 2½, 6, 4, 2, 2, 4, 6½, 3, 5, 2½, and 3½ lbs. respectively short of 1 cwt., making in all 51 lbs. short.

With the coal was sent a delivery note issued by the sellers, which, having regard to the cases of *Franklin* v. *Godfrey* (1) and *Baker* v. *Herd* (2), the justices regarded as a representation by the sellers that each of the said fourteen sacks contained 1 cwt. of coal. The appellant received the coal from the yard ready loaded, and had nothing to do with the weighing or loading of the coal and did not know that there was any short weight. The coal in the sacks was just as he had received it from the sellers.

It was contended on behalf of the appellant that he could not be convicted under s. 29 of the Weights and Measures Act, 1889, because he was not selling or exposing or offering for sale the coal from the vehicle, but was an innocent agent merely, and had made no representation as to the weight of the coal.

The justices overruled the appellant's contention, being of opinion that they were bound to convict him because he was the person in charge of the vehicle carrying coal for delivery in sacks containing less coal than was represented by the sellers, and that the contention of the appellant as to his being an innocent agent was incorrect, as he could have protected himself by seeing

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carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser.

"(2.) If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds."

(1) (1894) 63 L. J. (M.C.) 239.

(2) (1894) 58 J. P. 413.

that the sacks of coal were of the proper weight before taking them out of the yard. They therefore convicted the appellant and fined him 2*s.* 6*d.*, and 8*s.* 6*d.* costs, but stated a case for the opinion of the King's Bench Division, setting out the foregoing facts and submitting the question whether their decision was right in law.

Colam, for the appellant. The object of this Act is to impose the penalty on the seller making the representation. Where, as in this case, the master effects the sale and makes the representation, the servant is not the person to be convicted. The words "as the case may be" imply that the sale and representation which underlie the whole section are being effected and made by the person in charge of the vehicle. The seller may be selling or keeping or exposing the coal for sale either at his own place of business or upon or from a cart of which he is in charge. It was never intended that a person merely in charge of the cart should, as such, incur the penalty. If it were, a casual acquaintance to whom a carter entrusts the charge of the cart temporarily would be liable to be convicted and fined 5*l.* The man in charge of the vehicle is not liable unless he is actually selling, not merely delivering, the coal from the vehicle: *Roberts* v. *Woodward* (1), per A. L. Smith J.

The respondent was not represented.

LORD ALVERSTONE C.J. It is a general principle of the criminal law that a man is not to be convicted of a crime if he has no mens rea. There are, no doubt, a number of exceptions to that rule which are based upon the terms of particular statutes, for example, certain offences under the Licensing Acts and the Sale of Food and Drugs Act. But this Act creates no exception to the general rule. If it appears to a Court of summary jurisdiction that any sack is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, is made liable to the fine. The latter words indicate that the person in charge of the vehicle may be the seller making the representation. If he is the seller

(1) (1890) 25 Q. B. D. 412, at p. 416.

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making the representation he is liable. But in my opinion it would be straining the meaning of the enactment to hold that an innocent carter, taking out sacks of coal for delivery in entire ignorance that the sacks contain less than the weight represented by his employer, is liable to be convicted and fined. That would make the mere fact of taking out the coal a criminal offence. There is nothing in the statute to shew that that was intended. To come within the scope of the Act the person in charge of the vehicle must be selling, keeping, or exposing the coal for sale. The words "as the case may be" were inserted to cover the case where a representation has been made by a person who is not himself the owner of the coal, but who is acting as an agent in selling or exposing it for sale, and is sent out by the coal merchant not merely to deliver coal which without the agent's knowledge is in fact of less weight than that represented by the merchant, but to make a representation himself as to the weight of the coal he is selling and to sell coal of less weight than that represented by himself. On the facts before us there is no evidence of any such representation or sale by the appellant, and therefore the conviction must be quashed.

RIDLEY J. I concur.

DARLING J. I agree.

Appeal allowed: Conviction quashed.

Solicitors for appellant: *Sewell, Edwards & Neville.*

W. H. G.

KYLE, APPELLANT *v.* DUNSDON AND ANOTHER, RESPONDENTS. 1908 *April* 2.

Weights and Measures—Coal—Delivery in a Vehicle—Several Deliveries under One Order—One Ticket—Weights and Measures Act, 1889 (52 & 53 *Vict.* c. 21), *s.* 21.

The respondents, having sold to a purchaser twelve tons of coal, delivered a portion of the coal in sacks in a vehicle to the purchaser on September 23, 1907, and at the same time, before any part of the coal was unloaded, gave to the purchaser a ticket according to the form in the Third Schedule to the Weights and Measures Act, 1889, for the delivery of twelve tons of coal in 240 sacks, each sack containing 1 cwt. On October 2, 1907, thirty sacks of coal, each sack containing 1 cwt., being the remaining portion of the twelve tons, were sent by the respondents in a vehicle for delivery to the purchaser, and were delivered to him. No separate ticket was delivered or sent to the purchaser in respect of the thirty sacks of coal:—

Held, that the coal having been delivered in sacks and a ticket for the entire quantity having been delivered to the purchaser on September 23, the failure of the respondents to give a separate ticket in respect of the coal delivered on October 2 did not constitute a breach of the provisions of s. 21 of the Weights and Measures Act, 1889.

CASE stated by a Court of summary jurisdiction sitting at Slough.

An information was preferred by the appellant, an inspector of weights and measures, under s. 21 of the Weights and Measures Act, 1889 (1), against the respondents, for that they on October 2, 1907, at the parish of Stoke Poges, being the sellers of a certain quantity of coal exceeding 2 cwt., delivered by means of a certain vehicle to the Right Hon. Lord Decies, the purchaser thereof, unlawfully did not deliver therewith, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or his servant, before any part of the said coal was unloaded, a ticket or note according to the form in the Third Schedule to the Weights and Measures Act, 1889, or according to a form to the like effect.

(1) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 21, sub-s. 1: "Where any quantity of coal exceeding two hundred-weight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the Third Schedule to this Act, or according to a form to the like effect."

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Upon the hearing of the information the following facts were proved or admitted :—On October 2, 1907, at Stoke aforesaid, the appellant saw a vehicle belonging to the respondents in charge of a carman in their employ ; the vehicle contained thirty sacks of coal, each sack purporting, from a metal label attached, to contain 1 cwt. of coal, and was driven into the courtyard of Lord Decies' house for delivery to him of the said sacks of coal, which were then so delivered. The appellant asked the carman for his coal ticket, and the carman replied that he had no ticket with that load, and that twelve tons of coal were to be delivered, of which that load was part, and that one ticket had been given for the twelve tons. The carman thereupon obtained from a servant of the purchaser and produced to the appellant a ticket according to the form in the Third Schedule to the Act, addressed by the respondents to Lord Decies and containing the following words : "Take notice that you are to receive herewith twelve tons of coal in 240 sacks, each sack containing 112 lb." The appellant thereupon told the carman that a ticket should have been given with each load of coal delivered.

On the part of the respondents it was admitted that no ticket was delivered or sent with the load in question ; that there was a sale of twelve tons of coal by the respondents to Lord Decies ; that the coal which was delivered as before stated formed part thereof ; and that the only ticket given with respect to such twelve tons of coal was given when the first load thereof was delivered, namely, on September 23, 1907, and before any part of the coal was unloaded.

On the part of the appellant it was contended that where a quantity of coal exceeding 2 cwt. was delivered by means of a vehicle to a purchaser, whether the coal then delivered was part of a larger quantity purchased or not, the seller was bound with each separate delivery to deliver, or cause to be delivered or sent to the purchaser or his servant before any part of the coal constituting each delivery was unloaded, a ticket or note according to the form in the Third Schedule to the said Act ; and he quoted in support of his contention the case of *Stangoe* v. *Slatter* (1) ; and it was contended that it was not sufficient to deliver with

(1) (1896) 60 J. P. 342.

the first load of coal a ticket shewing the total quantity agreed to be purchased, and that the Act contemplated that the purchaser should have notice of the quantity of coal in each delivery exceeding 2 cwt.

On the part of the respondents it was contended that in cases where the delivery was in sacks of a specified number and weight, and not in loose loads of varying quantities involving the deduction for weight of the different parts before the purchaser could ascertain whether he was receiving such weight, a ticket delivered with the first load of coal, and before any coal was unloaded, shewing the total quantity to be delivered, whether on one or more days, and the number of sacks and the weight in each, was sufficient, and that the case of *Stangoe* v. *Slatter* (1), cited on behalf of the appellant, did not apply, inasmuch as in that case the coal delivered by the carts was not in sacks, but was loose and was delivered in varying quantities.

Upon the above facts a majority of the justices were of opinion that the ticket delivered with the first load of coal on September 23, 1907, was a sufficient compliance with s. 21, sub-s. 1, of the Act, and that a separate ticket with each load subsequently delivered was not required, and they, therefore, dismissed the information subject to this case.

Bonsey, for the appellant. The language of s. 21 of the Weights and Measures Act, 1889, is explicit, and the section requires that there shall be a ticket in the prescribed form whenever any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle. It is immaterial that the particular delivery in question may form part of a larger quantity, which has been ordered and which is being delivered at intervals of time, though it may be that if one order is carried out by a simultaneous delivery in more than one cart a separate ticket would not be necessary for each cart. *Stangoe* v. *Slatter* (1) is in the appellant's favour, for there the coal was delivered in three carts, each of which made two journeys, and it was held that an offence had been committed under the statute because there was only one ticket for the entire

(1) 60 J. P. 342.

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quantity of coal. The respondents should therefore have been convicted.

Bailhache, K.C., for the respondents, was not called upon to argue.

LORD ALVERSTONE C.J. In my opinion this is a perfectly plain case. The object of the Weights and Measures Act, 1889, is that every receiver of coal shall have an opportunity of being satisfied that he is getting the correct weight; and therefore, where the coal is delivered in sacks, the seller is required by s. 21 to deliver or send by post to the purchaser a ticket in the form in the Third Schedule stating the number of sacks and the weight of the coal; but if, however, the coal is sent in bulk, then s. 22 requires that the ticket shall also state the total weight of the coal and vehicle and the tare weight of the vehicle. It was contended for the appellant that, if the seller sent to a purchaser a ticket stating that the purchaser was to receive a certain quantity of coal in a specified number of sacks and the coal is delivered in instalments by sending it in carts on different dates, an offence is committed because a separate ticket has not been sent with each cart. I do not agree with that contention. In a case of that sort, if the purchaser has received one ticket for the entire quantity of coal he has only to count the number of sacks as and when they are delivered in order to ascertain whether the total weight of coal delivered to him corresponds with the weight specified in the ticket, and thus the object of the Act is fulfilled. The case of *Stangoe* v. *Slatter* (1) was relied on as supporting the appellant's contention, but the facts in that case were different from those of the present case. There the sale was of a truck-load of coal, and the delivery was made in three carts, each of which made two journeys. The ticket, which was not given to the purchaser until the carts had made the second journey, only stated the weight of the entire contents of the truck and nothing more, and it therefore gave the purchaser no information as to whether the coal in the carts corresponded in weight with the truck-load which had been

(1) 60 J. P. 342.

purchased. The Court accordingly held that the provisions of the Act had not been complied with, but I do not think that Lord Russell, in giving judgment, intended to lay down as a general rule that in every case it is necessary to have a separate ticket with each cart-load; but if he did intend to lay down a general rule to that effect, it was not necessary to do so for the purposes of the case then before him, and consequently it is not binding upon this Court. The Act does not in my opinion require that, where an order for a specified quantity of coal is carried out by deliveries in sacks on different dates, there shall be a separate ticket given in respect of each vehicle according to the number of sacks in it.

For these reasons I am of opinion that in the circumstances of this case the justices rightly decided that no offence had been committed, and this appeal must therefore be dismissed.

RIDLEY J. I am of the same opinion. I think that when ss. 21 and 22 of the Act are considered it is seen that a clear distinction is drawn between delivery in sacks and delivery in bulk. Sect. 21 applies when coal is delivered in sacks, and it is sufficient if the ticket, which may be sent by post, states the total weight of coal to be delivered and the number of sacks and the weight of their contents. It is obvious that if those requirements are complied with the purchaser is protected, and it is not necessary, in my opinion, that a separate ticket should be given with each separate vehicle in which the coal is delivered. In the case of a delivery of coal in bulk, which is dealt with in s. 22, different requirements are necessary, because in that case the purchaser cannot tell whether the proper amount is being delivered unless he is told the weight of each load, and, therefore, s. 22 provides that the seller shall insert in the ticket, in the case of a sale in bulk, the weight of the vehicle and the weight of the coal in the vehicle. It follows from that that where coal is sold in bulk there must be a separate ticket with each vehicle, because otherwise the provisions of s. 22 could not be complied with, but, reading ss. 21 and 22 together, it is not, in my opinion, necessary to have a ticket with each vehicle when the coal is sold by the sack.

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DARLING J. I am of the same opinion. If the Legislature had intended that where coal is sold by the sack there should be a separate ticket with each cart-load it would not have provided, as it has done in s. 21, that the ticket might be sent by post, but it would have required that the ticket should be brought with each load by the person delivering the coal.

Appeal dismissed.

Solicitors for appellant: *Wilkins & Son, Aylesbury.*

Solicitors for respondents: *Crowders, Vizard, Oldham & Co., for Barrett & Son, Slough.*

F. O. R.

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April 9.

HAMEL AND ANOTHER *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Shipping—General Average—Injury to Ship—Unloading Cargo for Purpose of repairing Ship—Damage to Cargo—Practice of Average Adjusters.

The owner of cargo which, not having been itself in any peril, has suffered damage from having been unloaded to enable repairs to be done to a ship which has through ordinary perils of navigation suffered a particular average loss, is not entitled to general average contribution from the owner of the ship.

A ship, having through ordinary perils of navigation sustained injuries which prevented her from proceeding upon her voyage, put back into port for repairs. To enable the ship to be repaired the cargo, which was never in peril, was unloaded, and, in the process of being unloaded, was damaged:—

Held, that the owners of the cargo were not entitled to general average contribution from the owners of the ship.

Svensden v. *Wallace*, (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404, discussed.

TRIAL of action before Lord Alverstone C.J. without a jury.

The claim was by owners of cargo against shipowners for a general average contribution. The cargo consisted of 3780 cases of window glass valued at 2420*l.*, shipped by the plaintiffs on board the defendants' steamship *Peshawur* at Antwerp, to be carried from thence to Shanghai.

The *Peshawur* completed her loading on the morning of December 4, 1905, the plaintiffs' glass being stowed in a hold

about amidships and in front of the engines and boilers. The vessel within a few minutes after leaving her berth on her voyage got into difficulties, and for an hour or thereabouts she was engaged in endeavouring to avoid perils of the river. She swung up in consequence of the flood tide catching her stern; she was in some danger of coming into collision with a vessel anchored higher up the river; she had to slip an anchor (which was subseqently recovered) to avoid coming into collision with some craft; she touched the ground with her stern on the left bank of the river, then came across, and finally, in the endeavour to avoid dangers, ran stern foremost against the wall of the quay near to the berth where she had loaded, and seriously injured her rudder and stern post. On sounding the after peak was found to be full of water, which made its way into the screw tunnel, but was kept down by the pumps. In consequence of the injury it was found necessary to take the vessel back to her berth, where rather more than half the cargo was unloaded, the crew working night and day for five days. Then, having some 4000 tons on board, the vessel was taken two miles further down the river, the rest of her cargo was discharged, and the vessel put into dry dock. The plaintiffs' glass was reshipped on board another ship of the defendants' called the *Pera*, and was taken to Shanghai, and was damaged in the process of being unloaded from the *Peshawur* and reloaded on board the *Pera*.

The plaintiffs contended that what had occurred at Antwerp constituted a general average act, and claimed a sum of 484*l*., either as upon an average statement or as damages for the defendants' breach of duty in not having had an average statement prepared. They called evidence to prove that when a ship has to put into port on account of a particular average loss, and cargo has to be discharged to allow of the ship being repaired, it is the practice of average adjusters to treat damage caused by discharging as a general average loss.

J. R. Atkin, K.C., and *Maurice Hill*, for the plaintiffs. The damage to the plaintiffs' cargo is matter for a general average contribution. As soon as this vessel started on her voyage she encountered a peril in which ship, freight, and cargo were all

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involved. The slipping of the anchor was the first general average sacrifice, and the acts that followed thereon, the putting back into the original berth for repairs and the unloading to enable the repairs to be executed, were done in order to extricate the whole venture from the common peril, and each act was in itself a general average act or part of a general average act.

Secondly, if there was no previous general average act, the putting back into the original berth for repairs was a general average act, being analogous to putting into a port of refuge for repairs. Then the unloading of the cargo, which was in truth part of the act of putting in for repairs, was a general average act: *Svensden* v. *Wallace*. (1)

Thirdly, even though the injury to the ship was a particular average loss only, yet the putting back into port and unloading to enable the ship to be repaired was a general average act. It is the universal practice of average adjusters so to regard it, and their practice is based on the judgment of Brett M.R. in *Svensden* v. *Wallace*. (2) "It may be necessary," said the Master of the Rolls, "to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo." He goes on to say that the expense of unloading, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But it may be that the landing of cargo can be treated as part of another act which is a general average act. If it be part of the act of going into port to repair and the repair cannot be done without landing the cargo, then the landing of the cargo is part of the act of going into port to repair. This case has, in the words of the learned judge, "always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure."

Another passage puts this even more clearly. "Unless, therefore," said the Master of the Rolls (3), "we are bound by authority to hold otherwise, I am of opinion that according to

(1) 13 Q. B. D. 69; 10 App. Cas. 404.

(2) 13 Q. B. D. 69, at pp. 76, 77.

(3) Ibid. at p. 78.

the law of England when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense." This passage is strictly in point and conclusive in favour of the plaintiffs in the present case.

Scrutton, K.C., and *Rowlatt*, for the defendants. There was no general average sacrifice in this case. That is clear from the judgment of Bowen L.J. in *Svensden* v. *Wallace*. (1) "Each item of expenditure which is challenged," said the Lord Justice, "must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one." Then, dealing with the question when unloading of cargo is to be regarded as a general average act, the Lord Justice said: "If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice: see *The Copenhagen*. (2) If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice." (3) The facts shew that the unloading of this glass was not necessary for the common preservation of both ship and cargo; at the time when it took place both ship and cargo were out of danger. Therefore the unloading does not answer the first test laid down by Bowen L.J.

Neither was it caused or rendered necessary by any antecedent act of general average sacrifice. The first act relied on is the

(1) 13 Q. B. D. 69, at p. 85. (2) (1799) 1 C. Rob. 289.
(3) 13 Q. B. D. at p. 88.

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slipping of the anchor; but the unloading of the glass was not caused by that. The second act relied on was the putting back into the berth from which the ship originally started. It is said that that act was equivalent to putting into a port of refuge for repairs in order to save ship and cargo. To say that is to ignore the facts of this case. What really happened was that the vessel within two hours of weighing anchor found herself back again in the berth from which she originally started, having in the meantime encountered nothing but the ordinary dangers of navigation.

As to the practice of average adjusters, which is said to be based on the passages cited from the judgment of Brett M.R. in *Svensden* v. *Wallace* (1), the practice is not justified by the tests laid down in the passages above cited from the judgment of Bowen L.J. in that case. (2) It is directly opposed to a later passage in the same judgment where the Lord Justice said (3): "It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to one's self the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the deadlock that would otherwise ensue." Moreover, the judgment of Lord Blackburn in the House of Lords in *Svensden* v. *Wallace* (4) is inconsistent with the view that the alleged practice of average adjusters is to be taken as being in accordance with law.

Atkin, K.C., in reply.

LORD ALVERSTONE C.J., after stating the facts, proceeded as follows:—The plaintiffs contend that either there was some

(1) 13 Q. B. D. 69, at pp. 76, 77, 78.
(2) 13 Q. B. D. at pp. 85, 88.
(3) 13 Q. B. D. at p. 88.
(4) 10 App. Cas. 404, at p. 416.

general average act before the cargo was unloaded, or that the fact that cargo was unloaded to enable the ship to be repaired constituted in itself a general average act even if there were no such act before the unloading. They say, therefore, that on the authorities the ship is bound to contribute to the loss they have sustained. The defendants do not dispute that, if there was a case of general average, they are bound to contribute on the same basis as if a general average statement had been prepared. That follows from *Crooks* v. *Allan*. (1)

It is, however, disputed, first, that there was any general average act before the cargo was discharged, and, secondly, that the discharge of the cargo constituted in the circumstances a general average act. This is the real question in the case. Mr. Atkin, for the plaintiffs, says that when the ship was brought back to her previous berth, her after peak having been found to be full of water, that was analogous to the case of a ship putting into a port of refuge, because having started on her voyage she had to put back again; but I do not regard this as a case of putting into a port of refuge. In my view, from the time this vessel left the quay until her stern post ran against the same quay, she was on her voyage and incurring perils of navigation, and the only thing that can be said is that by perils of navigation she sustained injuries which prevented her from proceeding on her voyage and fulfilling her contract. There was, in my opinion, no general average act before she came into contact with the quay. The slipping of the anchor was not a general average act; it was an ordinary act in the course of navigation done because it was no longer desirable that the ship should be held by that anchor. It was a mere isolated act in the course of navigation. There was up to the time of the injury no general average act, but the vessel was injured in the course of navigation in discharge of her duty to proceed upon her voyage; the case is the same as if there had been a collision between this vessel and another in the river, making it impossible for her to continue her voyage.

Then, admitting for the sake of argument that the injury done to the ship in coming into collision with the dock was only a

(1) (1879) 5 Q. B. D. 38.

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particular average loss, yet, inasmuch as repairs were necessary before the ship could continue her voyage and the cargo had to be discharged to admit of her being repaired, the plaintiffs contend that the discharge of the cargo was a general average act, the condition of things being that the whole venture was in peril and could only be saved by the unloading of the cargo to enable the ship to be repaired. Now I find as a fact that when the ship had got alongside of the quay in the berth from which she had started, and when her after peak was found to be full of water, there was no common peril to ship and cargo. It is true that if the bulkheads had broken down more water might have got into the ship; but that did not happen, and there was no reason for supposing that it would happen. It is also true that the pumps had to be kept continually at work to clear the tunnel, but that only means that the vessel was in a position in which certain steps had to be taken to prevent further damage to herself and possible damage to her cargo. It is as if a rent had been made in the ship's side by a collision causing one of the holds to fill with water and making it necessary to use the pumps, but not making necessary any sacrifice in order to save ship and cargo. Such a peril does not afford a basis for a general average sacrifice or a general average claim.

Assuming then that, there being no common peril, the cargo was unloaded because the ship could not otherwise be repaired, what is the position? Both sides rely upon the case of *Svensden* v. *Wallace* (1); but inasmuch as, in my opinion, the judgments in that case do not conclude the matter, I think it better to deal with the question on principle and state my own view of the law without going through the earlier authorities, which are all reviewed in *Atwood* v. *Sellar* (2) and *Svensden* v. *Wallace*. (1) I may observe in passing that the case of *Hall* v. *Janson* (3) is not an authority in point on the present case for the reasons pointed out by Bowen L.J. in *Svensden* v. *Wallace* (4); and, to put it shortly, there is no conclusive authority in support of the plaintiffs'

(1) 13 Q. B. D. 69; 10 App. Cas. 404.
(2) (1880) 5 Q. B. D. 286.
(3) (1855) 4 E. & B. 500.
(4) 13 Q. B. D. at pp. 86, 92.

position, unless certain passages from the judgment of Brett M.R. in *Svensden* v. *Wallace* (1), to which I will refer hereafter, are to be so regarded.

What view then on principle ought I to take of the unloading of a ship to enable her to continue a voyage on which she is unfit to proceed through an injury which is only a particular average loss? I must hold that the unloading in such circumstances is not a general average act, unless it is the law that, whenever a ship is prevented from finishing her voyage by reason of perils of the sea, all unloading, total or partial, effected to render the ship fit to proceed on the voyage must necessarily be a general average act for the simple reason that the voyage cannot otherwise be further continued and the ship cannot otherwise deliver her cargo and the venture as originally designed cannot be carried out. I am not prepared to hold that that is the law. To make a general average act there must be a common peril, and there is no general average contribution without a general average act, or an act consequential upon a general average act, and so intimately connected with it as to make with it in substance one continuous act done to relieve the whole venture from a common peril. If the consequence of a peril of the sea is merely to render one part of the venture abortive, merely to render the ship unfit to proceed or the cargo unfit to be carried further on the voyage, acts done merely to make the ship fit to proceed or done merely to make the cargo fit to be carried further on the voyage are not general average acts and do not afford ground for a general average contribution. On that ground I decide this case.

With regard to the authorities, it is only necessary to consider the case of *Svensden* v. *Wallace*. (2) Certain passages from the judgments in that case are relied on by Mr. Atkin. In the Court of Appeal Brett M.R. (3) put four cases, the fourth being as follows: "Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo." Then a few lines

(1) 13 Q. B. D. 69. (2) 13 Q. B. D. 69; 10 App. Cas. 404.
(3) 13 Q. B. D. at pp. 76, 77.

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further down he said: "In the second, third, and fourth cases the expenditure, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act." The fourth case is the one which is said to be indistinguishable from the present case. With reference to the fourth case Brett M.R. said: "If you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going in to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship into such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase, 'going in to repair.' The expression then is going in for repairs. The real accurate meaning is going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such case is upon the hypothesis so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure." At first sight that passage may appear to be in favour of the plaintiffs, but its reasoning is based upon the ground that the going into port was an act of sacrifice and that the landing of the cargo was, so to speak, part of the object to be attained in going into port. This is clear from the words "The fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice." The Master of the Rolls therefore does not say that the unloading of the ship derives its character as a general average act from the mere fact that it is done to enable the ship to be repaired, but from the fact that it is part and parcel of a general average sacrifice. The passage further on in the same judgment is again only an enunciation of the same principle. The Master of

the Rolls says (1): "Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that according to the law of England when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea-peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense." That passage seems to me to restate the principle that before the unloading can be treated as a general average act it must be part of the act of putting into port for repairs to save the whole venture from a peril; in other words, there must be a general average act to which the unloading of the cargo and the expenses thereby incurred are necessarily incident. I cannot, therefore, regard those passages as conclusive in favour of the plaintiffs.

Then there are two passages in the judgment of Bowen L.J. The first is as follows (2): "Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one." There is nothing in that passage contrary to the view I have expressed. Then the Lord Justice, having pointed out that *Hall* v. *Janson* (3) did not warrant the conclusion that the cargo ought to contribute whenever any expenditure is incurred, though it was incurred not for the purpose of saving the vessel and its contents, but merely for the sake of prosecuting the voyage, went on to deal with expenses of putting into port, and then come these passages which confirm my view of the judgment of

(1) 13 Q. B. D. at p. 78. (2) 13 Q. B. D. at p. 85.
(3) 4 E. & B. 500.

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Brett M.R. The Lord Justice said (1): "If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice: see *The Copenhagen*. (2) If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice." If in the present case the unloading was not to save the ship and cargo from a common peril, then, in the absence of some antecedent general average act, this case falls within the first limb of that sentence. This next passage makes the matter even more clear: "It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to one's self the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the deadlock that would otherwise ensue." I have read those passages and considered them, and I think the fair result of both judgments is the same.

As to the judgments in the same case in the House of Lords (3) I have only a few words to say. It is plain that Lord Blackburn did not take the view which Mr. Atkin has pressed upon me as the view of Brett M.R. I need only refer to one passage in the judgment of Lord Blackburn where he says (4): "I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper

(1) 13 Q. B. D. at p. 88.
(2) 1 C. Rob. 289.
(3) 10 App. Cas. 404.
(4) 10 App. Cas. at p. 416.

course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed." That passage shews that the question in this case was not regarded as concluded in favour of the plaintiffs by the passages cited by Mr. Atkin from the judgment of Brett M.R. in the Court of Appeal. The result is that there was in this case no general average sacrifice. The unloading, though necessary in order to get the cargo to its destination, was not in itself a general average sacrifice. There must therefore be judgment for the defendants.

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Judgment for the defendants.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb* and *Whatton.*
Solicitors for defendants: *Freshfields.*

W. H. G.

Observations of FLETCHER MOULTON, L.J., at p. 319, *explained.* KEMSLEY *v.* FOOT. [1952] 1 All E.R. 501.

[IN THE COURT OF APPEAL.]

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March 3, 4, 20.

HUNT *v.* THE STAR NEWSPAPER COMPANY, LIMITED.

Defamation—Libel—Personal Imputation—Plea of Fair Comment—Meaning and Effect of—Misdirection—New Trial.

In an action for libel based upon articles published in the defendants' newspaper the plaintiff alleged that the articles imputed to him improper conduct in the discharge of his duties as deputy returning officer at a municipal election. The defendants pleaded justification and fair comment. At the trial the judge directed the jury that if they found the statements in the articles to be libellous and the facts truly stated, then the question for them would be whether the comment was bona fide and fair, or whether it tended, as alleged, to charge the plaintiff with improper conduct. No separate questions were left to the jury, and they returned a general verdict for the plaintiff with damages. Upon an application for a new trial:—

Held by the Court of Appeal, that the question of fair comment had not been properly left to the jury as a separate issue, and that there must be a new trial on the ground of misdirection.

Dakhyl v. *Labouchere* (1) applied.

APPLICATION by the defendants for judgment or a new trial on appeal from the verdict of a jury at the trial before Lawrance J.

(1) See note at end of this report.

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The action was for damages for a libel contained in certain statements published by the defendants in two articles in the *Star* newspaper of March 2, 1907, and in the *Morning Leader* of March 4, 1907. The plaintiff, Mr. John Hunt, town clerk of the city of Westminster, alleged that these statements charged him with not having acted honestly and bona fide in the discharge of his statutory duties as deputy returning officer for the London County Council elections, with having acted improperly and unfairly in the interests of one political party as against the other, and with having been actuated by political bias.

It appeared that the plaintiff acted as deputy returning officer at the election of members of the London County Council for Westminster which was held on March 2, 1907. At the Caxton Hall polling station he had occasion, in discharge of his statutory duties, to require certain personation agents to retire from positions which they had taken up in the room. This occasioned disputes between him and the said agents and others, and the removal by his order of certain persons from the said polling station. The evidence taken at the trial as to what took place on the occasion in question was conflicting. The following were the articles complained of:—

In the *Star*:

"In Westminster.

"Serious Allegations made by Progressive Candidates.

"The *Star* was informed this afternoon that formal protests had been handed in by the Progressive candidates in Westminster, Messrs. Campbell and Herrin, against the action of Mr. John Hunt (clerk to the Moderate city council), who was the deputy returning officer at the Caxton Hall polling station. Mr. Hunt ordered the exclusion from the hall of the Progressive personation agents, one of whom was Major Hobart, lately Liberal candidate for the division, and it is further alleged that Mr. Campbell, although one of the candidates, was refused admission. It is further stated that one of the Westminster City Council officials doing duty at the polling station used the words 'I am not going to take the opinion of my political opponents' to Mr. Herrin, the other Progressive candidate. This assertion of political bias on the part of an officer at a polling station is to be the subject of

grave inquiry, and we are assured that the attention of Parliament will be called to the matter next week. The chairman of the Westminster Liberal Association told a *Star* reporter this evening that an appeal was being made to Mr. Gomme (clerk of the London County Council and returning officer) to overrule the decision of his deputy at Westminster. 'It is absolutely necessary that personation agents should be at Caxton Hall,' he added. 'Already we have detected plural voters recording second votes, and in cases where the evidence is conclusive we are determined to prosecute.'"

In the *Morning Leader :*

"Obstructing Progressives.

"Extraordinary Action by Westminster Polling Official.

"At the Caxton Hall (Westminster) polling station extraordinary obstacles were placed in the way of the Progressive polling agents in the performance of their duties—duties of particular importance in a constituency where plural voting exists on an abnormal scale. Mr. John Hunt, the town clerk, who is a Moderate, relegated the Progressive agents to a part of the hall where they could neither see the voters' faces nor hear their numbers, and were thus completely frustrated in their legitimate duty of seeing whether an elector was voting for the second time. The remonstrances of Major Hobart (late Liberal candidate for Westminster) and Mr. Montefiore Brice (chairman of the Westminster Liberal Association), who were acting as unpaid polling agents, resulted in their being turned out of the hall by the police, together with Captain Hemphill. On the failure of an attempt to obtain fair treatment, the Progressive candidates, Mr. W. B. Campbell and Mr. Edwin Herrin, handed in a formal protest, and withdrew their polling agents from the hall. Mr. Hunt told Mr. Herrin that he did not intend to take advice from the opposition. The incident is to be made the subject of a question in Parliament."

The defendants by their statement of defence denied that the words complained of bore the meaning alleged and said that they were not libellous. They pleaded that in so far as the said words consisted of statements of fact they were in their natural

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and ordinary signification true in substance and in fact, and that in so far as they consisted of comment they were fair and bona fide comment upon a matter of public interest and importance.

Lawrance J. in summing up to the jury, after reading the articles in question and the allegations of the plaintiff as to what the defendants meant thereby, said: "If a man writes something which has a tendency to prejudice a person in the office he is holding and says that he has not conducted himself properly in that office, that would be a libel. The question whether the words did mean what I have just read to you, the innuendo, is first of all a question for me whether the words are capable of that construction, and I hold that they are capable of that construction, and then it remains for you to say whether that is the proper view of the case." Then, after alluding to the defence that the words complained of were fair and bona fide comment upon a matter of public interest and importance, he said: "It is for me to say whether it is matter of public interest, as undoubtedly it was. It was a matter of public interest that a gentleman occupying the position of the plaintiff should properly discharge his duties. Then the question for you will be, if you find that these words were libellous and were intended to convey the meaning that I have already read to you that is alleged by the plaintiff, whether the words which purport to be statements of what took place are, in fact, true in substance and in fact. I need hardly point out to you that a man's words, however libellous they may be, if they are true would not be libel, and the plaintiff would not be entitled to damages. The question is whether the words, in so far as they relate to what took place at the polling station upon this particular day, are true, and in so far as they consist of comment whether it was bona fide and fair comment. The comment is their own remark made with regard to what is alleged to have taken place. If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or whether it was comment which tended, as alleged here, to charge the plaintiff

with improper conduct. That is, so far as the law goes, the question in this case."

Then, after reviewing the evidence at length, the learned judge continued: "Now, gentlemen, I have gone purposely at some length through the evidence, and you have the whole matter before you. I have told you the law on the question of libel, and it is for you to say whether these paragraphs which were inserted in these newspapers are libels or not. If you come to the conclusion that they are libels and are such as would have a tendency to prejudice the plaintiff in his position of town clerk of Westminster, of presiding officer and deputy returning officer of the county council elections, then you must give him your verdict. Then the next question is whether the defence is made out that the accounts given in these two articles of what happened at the Caxton Hall on this occasion were true in substance and in fact as far as they related to the details of what took place at the Caxton Hall. Then as far as comment is concerned you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in an improper way." In conclusion the learned judge said: "Now, gentlemen, that is the whole case. It is for you to decide, first of all, whether these articles constitute a libel, and, if so, the next question for you will be whether the defendants can make out their defence of justification, whether the words are true in so far as they purport to be an account of what took place at the hall, and whether the comment made upon them was fair comment. If you find that the words were libellous and that the defence is not made out you will say so. It is entirely for you to take the facts into your consideration and say, if you find for the plaintiff, what you think are fair and reasonable damages."

The jury returned a verdict for the plaintiff with 800*l.* damages. The defendants moved for a new trial on the ground, inter alia, that the learned judge had misdirected the jury by directing them in regard to the plea of fair comment that the question for the jury to decide was whether the comment was bona fide and fair comment or whether it was comment which tended to charge the plaintiff with improper conduct; and,

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further, that he had misdirected the jury by directing them that if they came to the conclusion that the words complained of were libels and were such as would have a tendency to prejudice the plaintiff in his position, they must return a verdict for him.

Eldon Bankes, *K.C.*, and *Norman Craig*, for the appellants. The observations made by the appellants' paper do not exceed the limits of fair comment. If the facts are truly stated, as they were in the present case, a newspaper is entitled to comment upon them, even though such comment may seem libellous. The ruling of Kennedy J. in his summing up in *Joynt* v. *Cycle Trade Publishing Co.* (1) correctly states the right of a paper to discuss and comment on facts of this kind, and this ruling was adopted and approved in *Dakhyl* v. *Labouchere*. (2) On this point there was a want of proper direction by the judge to the jury. The evidence was laid before the jury without any guide or any warning as to what was and what was not fair comment. The learned judge in the Court below has misunderstood and misstated the law in his directions to the jury, and for this reason alone the appellants are entitled to a new trial.

The nature and extent of fair comment are also clearly explained in *Merivale* v. *Carson*. (3) This too was approved in *Dakhyl* v. *Labouchere*. (2) There is no difference in principle between what is fair criticism of a work like a book or a play and fair criticism of a man. The standard of criticism is the same in both cases.

The learned judge directed the jury that if they thought the words conveyed an imputation they could not be fair comment. The defendants were entitled to have the verdict of the jury upon the question of fair comment, and that question was never properly left to them: *Campbell* v. *Spottiswoode*. (4) Lord Atkinson in *Dakhyl* v. *Labouchere* (2) said: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts; in other words, in my view, if it be a reasonable

(1) [1904] 2 K. B. 292, at p. 294.
(2) See note at end of this report.
(3) (1887) 20 Q. B. D. 275, at p. 281.
(4) (1863) 3 B. & S. 769.

inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." Applying that here, the defendants were entitled to have the question of fair comment left to the jury in that way. It was not so left to them, and there ought to be a new trial accordingly.

Shearman, K.C., R. F. Colam, and *Courthope Munroe,* for the respondent. At the trial the plea of justification was put forward and strenuously argued. If the facts were not truly stated there could be no fair comment: *Joynt* v. *Cycle Trade Publishing Co.* (1) The judge made it clear that he left the question of fair comment to the jury. The two questions left to them were, first, were the facts as stated true, and, secondly, if they were true, was the comment fair? They found in effect that the facts were not truly stated and that the comment was unfair.

It is said that the damages are excessive, but that is no ground for a new trial unless the Court thinks that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them: *Praed* v. *Graham.* (2)

[On this point they were stopped by the Court.]

Eldon Bankes, K.C., in reply. Taking the summing up as a whole, the effect of it was a direction to the jury that if they found the articles contained an imputation against the plaintiff, then they need not consider whether there was fair comment or not. The real question was never left to the jury at all. [He also referred to *O'Brien* v. *Marquis of Salisbury* (3), *Lefroy* v. *Burnside* (No. 2) (4), and Fraser on Torts, 6th ed. p. 109.]

Cur. adv. vult.

March 20. COZENS-HARDY M.R. This is an application for a new trial on the ground of misdirection. The action was for libel, based upon two articles in the *Star* and the

(1) [1904] 2 K. B. 292, at p. 294.
(2) (1889) 24 Q. B. D. 53.
(3) (1889) 6 Times L. R. 133.
(4) (1879) 4 L. R. Ir. C. L. 556.

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Morning Leader newspapers. The articles complained of related to the plaintiff, who was deputy returning officer at the Caxton Hall polling station at the election for the London County Council in March, 1907. I do not think it necessary to read the articles in full. The article in the *Star* is headed "In Westminster. Serious Allegations made by Progressive Candidates"; and the article in the *Morning Leader* is headed "Obstructing Progressives. Extraordinary Action by Westminster Polling Official." Each article stated certain alleged facts with reference to what took place in the Caxton Hall and, as the plaintiff asserts, charged the plaintiff with not having acted honestly in the discharge of his statutory duties as deputy returning officer, and as having been influenced by political bias with intent to prejudice the Progressive candidates. The defendants pleaded that the words complained of were in their natural and ordinary signification true in substance and in fact, and also, as a separate defence, that in so far as the said words consisted of comment the same were fair and bona fide comment upon a matter of public interest and importance. The issue of justification was strenuously fought at the trial. The learned judge, in summing up, after holding that it was a matter of public interest that a gentleman occupying the position of the plaintiff should properly discharge his duties, told the jury that the question for them would be, if they found that the words were libellous and were intended to convey the meaning alleged by the plaintiff, whether the words which purported to be statements of what took place were, in fact, true in substance and in fact. He pointed out that if these questions were answered in the affirmative, or, in other words, if the justification were proved, the plaintiff would not be entitled to damages, and he then dealt with the plea of fair comment as follows: "If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct." And at the end of the summing up he says this: "If you come to the conclusion that

they are libels and are such as would have a tendency to prejudice the plaintiff in his position of town clerk of Westminster and of presiding officer and deputy returning officer of the county council elections, then you must give him your verdict. Then the next question is whether the defence is made out that the accounts given in these two articles of what happened at the Caxton Hall on this occasion were true in substance and in fact as far as they related to the details of what took place at the Caxton Hall. Then, as far as comment is concerned, you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in an improper way." I regret that no separate questions were left to the jury. A general verdict was found in favour of the plaintiff with 800*l.* damages. Now it seems to me that the learned judge did not properly direct the jury as to the meaning and effect of the plea of fair comment. The words which I have read seem to indicate that that cannot be fair comment which tends to prejudice or to impute blame to the plaintiff. In my opinion that is not the law. The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true. But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might, in the opinion of the jury, be reasonably made. I cannot do better than adopt the language of Kennedy J. in *Joynt* v. *Cycle Trade Publishing Co.* (1) "The comment must . . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation." And in *Dakhyl* v. *Labouchere* (2) Lord Atkinson said: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be

(1) [1904] 2 K. B. 292. (2) See note at end of this report.

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inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." In substance it seems to me that the issue of fair comment was not left to the jury. It is highly probable that the jury thought that the facts were not truly stated, in which case the verdict for the plaintiff would be plainly justified; but it is also possible that they thought that, although the facts were truly stated, they must, as the learned judge told them, find for the plaintiff, if in the view of the jury the articles in question imputed improper conduct to the plaintiff. In my opinion the defendants are entitled to have a new trial in which both the issues raised by them may be presented to a jury with a proper and adequate direction. There must be an order for a new trial, but under the circumstances I think the costs of this appeal, as well as of the first trial, should abide the result of the second trial.

FLETCHER MOULTON L.J. With the greater part of the argument that was addressed to us by counsel for the appellants in this case I thoroughly disagree. That argument was based mainly upon an application of the language of the judgment in *Merivale* v. *Carson* (1) to the case of the imputation of corrupt or disgraceful motives to an individual, and the contention was that, if in his comment upon facts a writer attributed such motives to an individual, such language was covered by the plea of fair comment unless the views it expressed could not be held by any fair man, however prejudiced he might be and however exaggerated and obstinate his views. In my opinion this is a complete misapprehension of the law as laid down by that case, and is absolutely opposed to what is now settled law with regard to fair comment. The case of *Merivale* v. *Carson* (1) related to a criticism upon a play, and not to a question of libel on personal character, and the language of the judgments in that case shews that both the eminent judges who decided it intended to deal with literary criticism. The law laid down by the decision in

(1) 20 Q. B. D. 275, at p. 281.

that case has therefore nothing to do with personal libels such as the imputation of disgraceful motives to an individual. In order to demonstrate this it is only necessary to quote what may be said to be the leading passage in the judgment of Lord Esher. He says: "What is the meaning of a 'fair comment'? I think the meaning is this. Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what clearly would be beyond that limit. If, for instance, the writer attacked the private character of the author." With this language as applied to literary criticism I fully agree, but it gives no support to the contention of the counsel for the appellants in the present case, seeing that we have here to deal with imputations of motives which unquestionably amount to attacks on the character of the plaintiff.

The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews* v. *Chapman*. (1) The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. In this relation

(1) (1853) 3 C. & K. 286.

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I must express my disagreement with the view apparently taken by the Court of Queen's Bench in Ireland in the case of *Lefroy* v. *Burnside* (1), where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The Court treated the qualifications "dishonestly" or "corruptly" as clearly comment. In my opinion they are not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant "fraudulently represented," he was indulging in comment. By the use of the word "fraudulently" he was probably making the most important allegation of fact in the whole case. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J. to the jury in *Joynt* v. *Cycle Trade Publishing Co.* (2), which has been frequently approved of by the Courts.

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. This is the language of Kennedy J. in the case to which I have just referred. It is based on the judgments in *Campbell* v. *Spottiswoode* (3), a case of the highest authority, and is, in my opinion, unquestionably a true statement of the law. The only portion of the statement which requires examination is the phrase "except so far as the facts truly stated warrant the imputation." Speaking for myself, the words "warrant the imputation" can bear but one meaning, and that meaning is stated so plainly by Lord Atkinson in the opinion delivered by him in the case of *Dakhyl* v. *Labouchere* (4) in the House of Lords that I cannot do better than quote his language: "Whether the personal attack in any given case can reasonably be inferred from the truly

(1) 4 L. R. Ir. C. L. 556.
(2) [1904] 2 K. B. 292, at p. 294.
(3) 3 B. & S. 769.
(4) See note at end of this report.

stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence. I agree that an allegation of fact may be justified by its being an inference from other facts truly stated, but, as Lord Atkinson says in the passage just quoted, in order to warrant it the jury must be satisfied that such inference ought to be drawn from those facts.

Applying this law to the facts of the present case, I would say, first, that I have a great doubt whether there is anything in the publication complained of which can fairly be called comment at all, unless it be the headlines of the second article. All the rest appears to me to purport to be statement of fact, and therefore, in my opinion, the defendants could only succeed by establishing their plea of justification with respect to it. Even this plea was scarcely open to them, because the innuendoes alleged were so clearly borne out by the publications themselves that, so far as I can learn from the counsel for the defendants, they did not seriously attempt to contest them or to support the plea of justification. I have great doubt, therefore, whether the learned judge ought to have allowed the issue of fair comment to go to the jury at all (except, perhaps, as to those headlines). But the judge permitted it to go to the jury, and, therefore, he was bound to give them a proper direction as to it. In my opinion the direction he gave was so expressed as to bear a meaning which might have misled the jury and affected their verdict, and as it

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was a general verdict, not distinguishing the issues, but giving a sum by way of damages in respect of both, we have no alternative but to send the case back for a new trial, because it is impossible to say to what extent the verdict may have been influenced by such misdirection.

The first misdirection to which I refer is in the passage of the summing up which reads as follows: "If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct." Taken by itself this would seem to be a direction that if the comment charged the plaintiff with improper conduct it was outside the plea of fair comment, whether or not that charge was warranted by the facts, and although I think it clear from the sentence that immediately follows that the learned judge did not intend to give any such erroneous direction, and although I am of opinion that the defendants by their conduct of the case (as admitted before us by their counsel) did not seriously suggest that the matter was justified, I am unable to say that this direction may not have been misunderstood by the jury, and influenced their decision at least as to the amount of damages given. Two other passages towards the end of the summing up are also open to exception. The first reads as follows: "If you come to the conclusion that they are libels and are such as would have a tendency to prejudice the plaintiff in his position of town clerk of Westminster and presiding officer and deputy returning officer of the county council elections, then you must give him your verdict." This appears to ignore the question of fair comment altogether. The second reads: "Then as far as comment is concerned you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in an improper way." This is open to the misinterpretation to which I have already referred.

I am therefore of opinion that the case must go back for trial,

but under the circumstances I think that the costs of the appeal as well as of the first trial should abide the event.

BUCKLEY L.J. In my judgment there was such misdirection in this case as that the defendants are entitled to a new trial. The action was one for libel, to which the defendants pleaded justification and fair comment. The alleged libels consisted of certain statements of fact as to what took place at the Caxton Hall polling station, and further matter which conveyed an imputation that the plaintiff, who was the deputy returning officer at that station, was actuated by an improper motive, namely, by political bias. The defendants' case was that the statements of fact contained in the alleged libels were true, and, as to the imputation of motive, that it was protected by the defence of fair comment. The substantial point of the alleged libel lay in the imputation that the plaintiff, being a Moderate, had in his conduct as returning officer obstructed the Progressives and acted unfairly towards their personation agents. Where justification and fair comment are pleaded as defences the latter is a weapon which comes into action if and when the former has failed. The defence of fair comment assumes that the matter to which it relates would be defamatory if it were not protected by the defence of fair comment. A fair and bona fide comment on a matter of public interest suffices to protect that which would otherwise be defamatory. Comment which tends to prejudice may still be fair; it may convey imputations of bad motive so far as the facts truly stated justify such an imputation. It is for the jury to say whether the facts justify the imputation or not. The fault here is that that question has never properly been left to them. The question for the jury is whether the comment is in their opinion beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and which was not without foundation. The defence of fair comment extends to the imputation of motives. Cockburn C.J. in *Wason* v. *Walter* (1), speaking of the development of the law of libel, says: "The full liberty of public writers to comment on the conduct and motives of public

(1) (1868) L. R. 4 Q. B. 73, at p. 93.

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men has only in very recent times been recognized." Whether the imputation is within the defence of fair comment or not is for the jury. It is for them to say whether the imputation was warranted by the facts and honestly represented the opinion of the person who gave expression to it, and that his belief was not without foundation. Cockburn C.J. in *Campbell* v. *Spottiswoode* (1) says "that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest but also well-founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is therefore justified in assailing his conduct as dishonest." Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it and was not without foundation.

In the present case the learned judge, in my judgment, failed to direct the jury that the comment which charged the plaintiff with improper conduct would not be libellous if it was the honest expression of the well-founded opinion of the writer based upon the true facts. The jury were in substance directed upon the question of fair comment that an imputation which charged the plaintiff with improper conduct was libellous whether it was or was not an honest expression of opinion upon a true state of facts, or at any rate were not directed that it was for them to say whether the imputation was or was not an honest expression of opinion and had foundation. This misdirection may have caused a miscarriage in either one or both of two ways. It may be, and it seems to me impossible to say that it was not, the case that but for this direction the jury would not have found the matter libellous at all. They may have thought that the statements of fact although not absolutely were yet substantially true, but that the imputation of

(1) 3 B. & S. 769, at p. 777.

political bias which was really the substance of the matter was libellous whether it was an honest expression of opinion warranted by the facts or not. And, secondly, it may well be that the imputation of misconduct originating from political bias weighed largely with the jury in assessing the damages, and that they understood that they were bound to find that to be libellous. These circumstances are not to my mind answered by saying that to some extent the statements of fact as to what took place in the polling booth are not wholly accurate. It was for the jury to say whether they were substantially true or not, and it may well be that, while finding them to be substantially true, they held the matter to be libellous and assessed the damages upon the wrong ground as regards the defence of fair comment. I think, therefore, that the order must go for a new trial upon the ground that the defence of fair comment was not properly put to the jury. I agree as regards the costs.

Appeal allowed.

Solicitors for appellants: *Lewis & Lewis.*
Solicitors for respondent: *Allen & Son.*

NOTE (see ante, p. 309 (1)).

[HOUSE OF LORDS.]

H. L. (E.). Feb. 14, 15, 25; March 14, 1907.

DAKHYL *v.* LABOUCHERE.

THIS was an appeal from a decision of the Court of Appeal, setting aside a verdict and judgment for 1000*l.* in favour of the appellant (the plaintiff in the action) and ordering a new trial.

The appellant was a doctor of medicine, a bachelor of science, and a bachelor of arts in the University of Paris; and he had since August, 1902, practised as a doctor in Kensington, specializing in the treatment of diseases of the ear, nose, and throat.

The respondent was the editor and proprietor of the newspaper called *Truth*. In the issue of that paper dated April 2, 1903, he had published the following paragraph relating to the appellant:—

"Sundry inquiries have reached me during the last week or two respecting one Dr. H. N. Dakhyl, of 178, Holland Road, Kensington, who appends to his name the symbols 'B.Sc., B.A., M.D. Paris, &c.,' and describes himself as 'a specialist for the treatment of deafness, ear, nose, and throat diseases.' Possibly this gentleman may possess all the talents which his alleged foreign

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degrees denote, but, of course, he is not a qualified medical practitioner, and he happens to be the late 'physician' to the notorious Drouet Institute for the Deaf. In other words, he is a quack of the rankest species. I presume that he has left the Drouet gang in order to carry on a 'practice' of the same class on his own account, and probably he is well qualified to succeed in that peculiar line."

The appellant (the plaintiff) then brought this action claiming damages for libel. The respondent, in his defence, pleaded justification and fair comment. The action was tried before the Lord Chief Justice and a special jury, and resulted, as above stated, in a verdict and judgment for the appellant. On the motion of the respondent, the Court of Appeal (Collins M.R. and Stirling and Mathew L.JJ.) on July 28, 1904, set aside the verdict and judgment and ordered a new trial, on the grounds that the jury might not have sufficiently apprehended from the summing up of the Lord Chief Justice (1.) that it was for them to decide whether the words complained of were defamatory of the appellant; and (2.) the nature and extent of the defence of fair comment.

From this decision the appellant (the plaintiff) appealed.

The effect of the summing up sufficiently appears from the judgments of the Lord Chancellor and Lord Atkinson.

Sir Edward Clarke, K.C., and *Hon. Malcolm Macnaghten*, for the appellant.
Shee, K.C., *Eldon Bankes, K.C.*, and *Hugh Fraser*, for the respondent.

LORD LOREBURN L.C. My Lords, in this case, which was one of libel, the Court of Appeal has ordered a new trial, and I am driven to the conclusion that no other order is possible. The pith of the libel is that the defendant wrote of plaintiff as a "quack of the rankest species" in connection with his service on the staff of the Drouet Institute. The defendant denounced the Drouet Institute, on what he claimed to be public grounds, as an organized system for dishonestly obtaining money from persons suffering from deafness in hope of a cure. The defendant pleaded that his accusation against the plaintiff was true, and also that it was protected as a fair comment upon a matter of public interest. The jury found a verdict for the plaintiff for 1000*l*. I rest my opinion that the verdict cannot stand upon two grounds. In the first place, the defendant was entitled to have the jury's decision, on his plea of justification, whether the words used were true in the plain meaning which the jury might attach to them. Unfortunately the learned judge told the jury more than once that the term "quack" meant a pretender to skill which the pretender did not possess. If that were a sound direction, and really it was put as a direction, there could not be a verdict on this point against the plaintiff, for admittedly he possessed skill. But there are other meanings of the word "quack," such as a person who, however skilled, lends himself to a medical imposture. The jury were the persons to affix the true meaning to the words and to say whether or not it fitted the plaintiff. But they had not the chance if they followed the judge's direction. In the second place, the defendant was, in my opinion, entitled to have the jury's decision, as to the plea of fair comment, whether or not, in all the circumstances proved, the libel went beyond a fair comment on the

plaintiff and on the system of medical enterprise with which he associated himself, as a matter of public interest treated by the defendant honestly and without malice. The plea of fair comment does not arise if the plea of justification is made good, nor can it arise unless there is an imputation on a plaintiff. It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in. But the learned judge put aside that defence, and told the jury that unless a justification was proved they were bound to find a verdict for the plaintiff, and that, unless justified, the libel is not fair comment and cannot come within the region of fair comment. I agree in what Sir Edward Clarke said to us of the evil which may flow from an order for a new trial in this case. In all cases it is a most deplorable result, not to be entertained upon any but the most solid grounds, as the only means of redressing a clear miscarriage. In the present case I regret it all the more, because the amount of the verdict seems to indicate that the jury took the plaintiff's view of the facts. But I cannot reconcile myself to allowing a verdict to stand when I am convinced that the opinion of the jury was not really taken on two vital points on which the defendant was in law entitled to insist and did insist.

LORD ROBERTSON. I entirely concur in the judgment just delivered by my noble and learned friend on the woolsack.

LORD ATKINSON. My Lords, I concur in the opinion that the appeal should be dismissed and the judgment of the Court of Appeal affirmed. [His Lordship then referred to certain passages in the summing up of the Lord Chief Justice, and continued :—] From these and other passages to the same effect contained in the summing up, it is, I think, clear that at the trial Mr. Shee, on behalf of the defendant, put forward, or attempted to put forward, the same contentions he has put forward before your Lordships—namely, (1.) that the accusation made against the plaintiff in the words which have been described as the sting of the libel amounted in effect to this, and only to this, that the plaintiff "was a quack of the rankest species by reason of his connection with the Drouet Institute, and by reason of his having resorted to and adopted the quack methods of that notorious establishment"; and (2.) that the libel so interpreted was true in substance and in fact, or if not was a fair comment. I do not for a moment suggest that the meaning thus put upon the libel by the defendant is its true meaning, but I think it would be impossible successfully to contend that it is not reasonably susceptible of that construction, or, to use the words of Lord Esher in *Merivale* v. *Carson* (1), that "it could not be thought by any reasonable man to have that meaning." If that be so, as I think it is, it was the right of the defendant to have it in some form of words distinctly left to the jury to say whether the meaning so put upon the libel by the defendant was, in fact, the meaning it conveyed to the mind of the ordinary reader. This, however, was not done. No such question was ever left to the jury. The contention was practically ruled out; and the reason why it was not left to them is apparently this, that the libel, read in the sense contended for by the

(1) (1887) 20 Q. B. D. 279.

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defendant, does not necessarily impute to the plaintiff want of skill or professional incompetence at all, whereas it would appear to me that the learned Chief Justice was of opinion that the words "he is a quack of the rankest species" necessarily conveyed an imputation of want of skill or incompetence, and that his instruction to the jury on the point amounted to a direction to that effect. He treated the question of the plaintiff's "being a fully qualified man able to deal with the treatment" of the diseases treated in the Drouet Institute as being put beyond all controversy by his possession of the degree of M.D. of Paris, and nearly at the end of his summing up used the following words: "It seems to me that the first question you have to consider is, Has the defendant established before you that this man was a quack of the rankest description? That is the sting of the libel. I am not going over it again. I have told you what that means, and you will consider it from that point of view. If the defendant has not established it, then, of course, the plaintiff is entitled to your verdict. Upon the other part of the case, if you think the system of the Drouet Institute, which Dr. Dakhyl is now carrying on, is a system which no competent medical man ought to be a party to, then you would not think so much of him." But the only portion of his summing up in which he had purported to tell the jury what those words meant was the passage first quoted by the Master of the Rolls, in which he stated that they meant not only "an incompetent person but a person who puffs his own incompetence before the public," a person, "who pretends to medical skill he does not possess." With all respect to the learned Chief Justice, I think he was in error in the course he took. I think that in effect he took upon himself to determine the question which it was the province of the jury to in fact determine, namely, the meaning which the libel in fact conveyed to the mind of an ordinary reader—the sense in which the words complained of were to be understood by that reader. Upon the question of fair comment, with equal respect to the learned Chief Justice, I think he also fell into error. It is only necessary in order to shew that to quote two passages from his summing up dealing with this subject. They respectively run as follows: "(1.) You were told yesterday, and you were told again this morning by Mr. Shee, that the real question here was, was this fair comment, and that if it is fair comment, the fact that the defendant has used strong or exaggerated language, if honestly used, would not prevent it from being fair comment. Upon one part of the case that is a perfectly just observation, namely, upon that part of the case which involves the question of the kind of practice that the plaintiff has carried on; but I am bound to tell you that that has nothing to do with the personal attack upon the plaintiff as a man in his profession. If you find that the defendant has libelled the plaintiff in his profession as a medical man, the fact that the defendant wanted to comment upon a system which he did not approve of would be no justification at all. (2.) Therefore, in so far as this paragraph, if it be a paragraph which is otherwise libellous, relates to the system carried on by the Drouet Institute, of which the plaintiff was the physician, and to criticizing that system because it was a system purporting to advise people without seeing them, in so far as that is a matter for consideration what Mr. Shee told you about fair comment would be (and I tell you so)

absolutely right, and you ought not to condemn a man because he has used strong language about it. The other branch of the case is the attack upon the individual, and, as has been laid down by many judges of far greater experience and ability than anything I can ever hope to attain to, fair comment is not to be made the opportunity of personal attack. Therefore the first question you have to consider is, Aye or No, is there any personal attack on the plaintiff in his profession as a medical man? If there is not, the personal element goes out of the case, and you may then consider a great deal of what has been said to you as to the criticism upon the system, but if besides the system which is supposed to be attacked and criticized there is personal comment, then you have to consider whether it is true." The statement of the law contained in these passages is, I think, enforced in other portions of the summing up. I cannot find that it is in substance qualified in any. It is, in my opinion, altogether too wide. A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn. The well-known passage from the judgment of Crompton J. in *Campbell* v. *Spottiswoode* (1), relied upon so strongly by Sir Edward Clarke, was not confined to literary criticism, but applied "to writers on any public matter," and distinctly laid down the principle that if base and sordid motives which are "not warranted by the facts" be imputed, the fact that the writer bona fide believed his imputation to be well founded affords no defence. *Joynt* v. *Cycle Trade Publishing Co.* (2) is to the same effect. In this case the established facts might not warrant the personal charge made against the plaintiff of being "a quack of the rankest species," if that charge necessarily implied "incompetence or want of skill" on his part, but if, on the other hand, the libel bears the meaning contended for by the defendant—and, as I have already said, I think it is reasonably susceptible of that meaning—then the question whether the imputation was a fair comment in that it was warranted by the established facts was quite another matter, and should have been left to the jury to determine. The assumption on which the learned Chief Justice appears to have proceeded, namely, that incompetence or want of skill was necessarily imputed to the plaintiff, shaped and coloured his whole summing up. It led him to instruct the jury upon the law in a manner which amounted to misdirection, and prevented him from taking the opinion of the jury on the issue raised by the defendant as to the meaning of the libel. It was, I think, an erroneous assumption, and the fact that it was acted upon necessitates that there should be a new trial, however hard it may be on the plaintiff to be burdened with the cost of a second investigation. There can be no more just and wholesome rule of practice, in my opinion, than that laid down by

(1) (1863) 3 B. & S. 769, at p. 778.

(2) [1904] 2 K. B. 292.

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Lord Halsbury in *McDougall* v. *Knight*(1) as to raising new questions on appeal, but this case does not come within it. The questions raised here are not new. They were, in my view, raised below, and practically ruled upon by the Lord Chief Justice in the course of the case.

Solicitors for the appellant : *Collyer-Bristow & Co.*
Solicitors for the respondent : *Lewis & Lewis.*

G. A. S.

1908 *March* 30.

In re BUMPUS. *Ex parte* WHITE.

Bankruptcy—Distress for Rent—Lessee adjudicated Bankrupt on the Day of Distress—Judicial Act—Commencement of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 42, 43.

By virtue of s. 43 of the Bankruptcy Act, 1883, the bankruptcy of a debtor commences "at the time of the act of bankruptcy being committed on which a receiving order is made against him," that is to say, at the actual moment of the day when the act of bankruptcy is committed.

Where, therefore, a debtor presented his own petition at 12.50 P.M. on October 23, 1907, and consented to a receiving order and an immediate order of adjudication being made against him :—

Held, that his bankruptcy commenced at the moment of time, i.e., 12.50 P.M., when he presented his petition, notwithstanding that the order of adjudication, being a judicial act, would otherwise have operated from the earliest hour of that same day.

THIS was an application by the trustee which raised the question as to the time when the debtor's bankruptcy commenced.

The debtor was a bookseller and held his business premises on a lease for years at the rent of 500*l.* per annum, payable quarterly on the usual quarter days. On October 23, 1907, at 12.50 P.M., he presented his own petition in bankruptcy, and at the same time consented to a receiving order and an immediate order of adjudication being made against him. On the same day and at about the same time his landlords distrained on his business premises for the six months' rent which had accrued up to the previous September 29. The distress was withdrawn

(1) (1889) 14 App. Cas. 194.

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on the official receiver undertaking that the rent would be paid, and a few days afterwards Mr. White, the trustee in bankruptcy, paid this rent. The trustee remained in occupation of the business premises until December 25, when another quarter's rent became due. He then vacated the premises and tendered the landlords the rent for the period he had been in occupation of the premises, namely, from October 23 to December 25, and stated that they must prove in the bankruptcy for the rent that accrued between September 29 and October 23. The landlords insisted that they were entitled to payment of the full quarter's rent due on December 25, and on February 23, 1908, they put in a distress for that amount. The trustee then applied to the Court for an injunction to restrain them from proceeding with the distress, and by arrangement the distress was withdrawn without prejudice to the question at issue. There was a conflict of evidence as to whether the distress of October 23 was levied shortly before or after 12.50 P.M. on that day, and by arrangement the question was first argued on the assumption that it was levied shortly before 12.50 P.M.

E. W. Hansell, for the trustee. By s. 42 of the Bankruptcy Act, 1883, as amended by s. 28 of the Bankruptcy Act, 1890, a landlord is entitled to distrain "after the commencement of the bankruptcy" for six months' rent accrued due prior to the date of the order of adjudication. Assuming that the distress in this case was levied before the petition was presented, the question is, when did the bankruptcy commence? It is doubtful whether a receiving order is a judicial act, but an order of adjudication is a judicial act, and, being a judicial act, it operates from the earliest period of the day on which it is pronounced: *Wright* v. *Mills* (1); *Edwards* v. *Reg.* (2); *Clarke* v. *Bradlaugh.* (3) The bankruptcy, therefore, commenced immediately after midnight on October 22, and the landlords' first distress having been levied after the commencement of the bankruptcy, they can now only prove for the rent that accrued between September 29 and October 23.

(1) (1859) 4 H. & N. 488. (2) (1854) 9 Ex. 32, 628.
(3) (1881) 8 Q. B. D. 63.

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Sanderson, K.C., and *Compston*, for the landlords. The authorities cited do not apply because there is an express provision in the Bankruptcy Act, 1883, which says when the bankruptcy shall commence. Sect. 43 enacts: "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition." "The time of the act of bankruptcy" means the actual moment of the day on which the act of bankruptcy is committed. The actual moment when a bankruptcy petition is presented is always noted by the Court. Here the actual moment when the debtor presented his petition was 12.50 P.M. on October 23; that was the time when the act of bankruptcy was committed, and that was the time when the bankruptcy commenced. Therefore the distress for rent levied on that day was made before the commencement of the bankruptcy, and the landlords were afterwards entitled to distrain for the whole of the quarter's rent that accrued due on December 25.

Hansell, in reply. Sect. 43 provides for the relation back of the trustee's title and is an artificial extension of the commencement of the bankruptcy to a period anterior to the actual commencement. Here there is no relation back to an earlier date, and therefore no artificial commencement. The trustee relies on the words "shall be deemed to have relation back to and to commence" as pointing to an artificial commencement. Here we have the actual commencement on October 23, and on that day the order of adjudication, a judicial act, which operated from the earliest hour of that day.

BIGHAM J. I think the contention of the respondents is correct. I think, having regard to the language of s. 43 of the Act, that the bankruptcy must be taken to have commenced at the moment

of time when the act of bankruptcy was committed, namely, at 12.50 P.M. on October 23.

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[Evidence was then adduced on both sides as to the actual time on October 23 when the distress was levied. In the result the Court held that the distress was levied shortly after the debtor had presented his petition. It followed that the landlords were only entitled to payment for the period that the trustee had been in possession, and must prove in the bankruptcy for the period between September 29 and October 23.]

Solicitors: *Piesse & Son; W. Gamble.*

H. L. F.

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April 14.

Subpœna duces tecum—Sealed Packet containing Formula—Deposit in Bank—Obligation of Banker to produce and deliver up—Extradition Act, 1873 (36 & 37 *Vict. c.* 60), *s.* 5.

A sealed packet may be a "document," and therefore liable to production upon a subpœna duces tecum.

The fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositors is no answer to a subpœna duces tecum requiring the banker to produce the document.

Where there is disobedience to a subpœna duces tecum, the Court has jurisdiction to enforce obedience by attachment, even though the disobedience is not wilful.

Reg. v. *Lord John Russell*, (1839) 7 Dowl. P. C. 693, explained.

RULE nisi calling on the respondent Arthur John Daye, the representative of the Union of London and Smiths Bank, Limited, to shew cause why a writ of attachment should not issue against him for contempt in not paying obedience to a writ of subpœna issued out of the High Court of Justice, commanding the bank by their secretary, manager, or other proper officer to appear before a metropolitan magistrate sitting at the Bow Street Police Court on April 3, 1908, there to testify the truth and to give evidence on proceedings under

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the provisions of s. 5 of the Extradition Act, 1873 (1), in respect of a criminal matter pending in the Court of the Tribunal of the Seine, in the jurisdiction of the French Government, in which one Henri Lemoine was the accused person, and to bring with him and produce before the metropolitan magistrate a sealed packet deposited with the bank on June 8, 1905, in the joint names of Wernher, Beit & Co. and Henri Lemoine.

On February 21, 1908, Sir Albert de Rutzen, the chief magistrate of the Bow Street Police Court, received from the Home Office an order in writing dated February 18, 1908, under the Extradition Act, 1873, authorizing and requiring him to take evidence in the manner prescribed by the Act of 1873 of any witness appearing before him who might be able to give relevant evidence in relation to a criminal matter then pending in the Tribunal of the Seine, and to transmit such evidence to the Secretary of State for the Home Department in pursuance of the statute.

Annexed to the order of February 18, 1908, was a *commission rogatoire* issued by the Juge d'Instruction of the

(1) Extradition Act, 1873, s. 5: "A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign state; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

"Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

"Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

"Provided that nothing in this section shall apply in the case of any criminal matter of a political character."

Tribunal of first instance of the Department of the Seinė. The *commission rogatoire* contained a statement that criminal proceedings were pending in France against Henri Lemoine, who was charged with having defrauded Sir Julius Wernher, Bart., and requested the British authorities to obtain possession of a sealed packet deposited with the Union of London and Smiths Bank and to send it to the office of the Tribunal Correctionel of the Department of the Seine, there to remain in the possession of the judicial authorities until further order.

On April 3, 1908, the chief magistrate at Bow Street Police Court sat in pursuance of the order of February 18, 1908.

Before the magistrate Sir Julius Wernher, Bart., a partner in the firm of Wernher, Beit & Co., deposed that by a contract dated May 5, 1905, with Lemoine, he (Lemoine) undertook to deposit in the names of Sir Julius Wernher, Bart. (acting for his firm), and that of Lemoine a formula describing a secret process for manufacturing diamonds equal to natural ones in such a way that an ordinary chemist could on seeing it carry it out, and this formula (which was also referred to in the deposition of the chief of the securities department of the Union of London and Smiths Bank, Limited, as a sealed packet) was accordingly deposited with the bank. It also appeared from the depositions that the bank gave the following receipt when the formula was so deposited: "Received from Monsieur Henri Lemoine and Messrs. Wernher, Beit & Co. jointly a sealed envelope for safe custody, this sealed envelope not to be withdrawn except with the consent of both parties, or in case of the death of Monsieur Henri Lemoine by the consent of Mr. Jocelyn Brandon and Messrs. Wernher, Beit & Co."

The respondent Daye appeared before the magistrate in pursuance of the subpœna as a representative of the Union of London and Smiths Bank, Limited. He went into the witness-box and was sworn and admitted that he had brought the sealed packet, but declined to produce it or deliver it up. Counsel on behalf of the bank objected that the witness ought not to be ordered to produce or deliver up the document. The magistrate overruled the objection and ordered the witness to produce the document, but the witness, or counsel on his behalf, declined to

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do so, and it was not in fact produced. The rule nisi was then obtained.

The respondent made an affidavit in opposition to the rule being made absolute, which (so far as material) was as follows: "Upon June 8, 1905, the bank received and accepted for safe custody a sealed packet deposited in the joint names of Wernher, Beit & Co. and Henri Lemoine. . . . . I was instructed by my directors to attend at the Bow Street Police Court on behalf of the bank and to take with me the sealed packet. I was further directed by my directors to respectfully decline to produce and deliver the same to the magistrate for the following reasons:—

"(*a*) Inasmuch as the sealed packet had been deposited with the bank by the two depositors and the bank had undertaken to safely keep the same and not to produce or deliver the same to any person without the consent of both the depositors, and inasmuch as the depositor Lemoine has always objected and still objects to my directors so producing and delivering the same and has never consented thereto, my directors were advised and believe that they would be committing a breach of the duty that they had undertaken if they did so produce and deliver the sealed packet.

"(*b*) My directors are further advised that the contents of the sealed packet are not in fact a document and are therefore not liable to production upon a subpœna issued under and for the purposes of s. 5 of the Extradition Act, 1873.

"(5) By reason of the premises I humbly submit . . . . that I have not been guilty of any contempt of Court. Throughout these proceedings my directors have been anxious to obtain a decision of this Court upon the matters hereinbefore specified, and if this Court decides that the bank should produce the sealed packet I will humbly submit to the ruling of the Court and will immediately produce the same, but until such ruling has been obtained I am advised and verily believe that I cannot do so having regard to the undertaking and with safety to myself, my directors and their shareholders."

Avory, K.C., and *Patrick Hastings* shewed cause. The principle upon which the Court will grant a writ of attachment for disobedience to a subpœna duces tecum is clear from the judgments

in *Reg.* v. *Lord John Russell.* (1) There must be a contempt which implies an intentional defiance of the powers of the Court. The difficulty is that the bank is being asked to produce a document for the purpose of its being sent abroad. The same objection would have applied if the criminal proceedings had taken place in England. The sealed packet is not a document within the meaning of the Extradition Act, 1873, or the subpœna duces tecum. A sealed packet is of the same nature as a safe or tin box. Sect. 5 of the Extradition Act, 1873, expressly mentions a "document." It is not desired to take the point that an alternative course was open to the prosecution under s. 16 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42). In order to make a sealed packet a document there must be evidence that there is writing upon the packet.

[DARLING J. referred to Murray's New English Dictionary, vol. 3, p. 573, "Document."]

The present proceedings, which are taken under s. 5 of the Extradition Act, 1873, are different from criminal proceedings in the ordinary sense. In Clarke on Extradition, 4th ed. at pp. 257, 258, it is said that s. 5 of the Act of 1873 is in conflict with the whole spirit of our law, and that there is no instance of its being put in force since the passing of the Act.

The grounds upon which the rule ought to be discharged are (1.) that the sealed packet is not a document; (2.) that under the circumstances an order ought not to be made that it be handed over by the bank.

[Taylor on Evidence, 10th ed. ss. 1239, 1240, was also referred to.]

Sir W. S. Robson, A.-G., and *Rowlatt*, in support of the rule. In the depositions the sealed packet is referred to as an envelope and as a formula describing a secret chemical process. It is therefore a document.

LORD ALVERSTONE C.J. In this case I am of opinion that the sealed packet must be produced and given into the custody of the magistrate. No doubt the magistrate will exercise his judgment as to how he will deal with it. He is not bound

(1) 7 Dowl. P. C. 693.

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to send it to France if he does not think it right. The real ground upon which privilege from production is claimed is that this sealed packet is to be treated as not being a document—that it consists of something in a sealed envelope—and that, being a packet, it is not to be assumed to be a document. In support of the rule nisi the Attorney-General told us in one sentence what the evidence before the magistrate was, namely, that the sealed packet or envelope is supposed to contain a recipe or formula which will enable a competent chemist to carry out a chemical process. Therefore before the magistrate there was no suggestion made that this envelope does not contain some written paper. In my judgment it is quite impossible to say that the subpœna can be answered and defeated by the fact that one of the persons who deposited the document with the bank made an arrangement that it should not be delivered up by the bank without the consent of the two parties who deposited it. That is the ordinary way in which documents which belong to two persons, or in which two persons have an interest, are deposited; and where there is a criminal proceeding, and there is a suggestion that the document deposited will be important evidence in the case, I can see no ground whatever for the contention that the fact that the bank, or any other custodian, received it on the terms that it should not be delivered up except by the consent of the two depositors is any answer at all. In my judgment this document deposited with the bank on the terms that they should not give it up ought to be produced to the Court in the ordinary process of law.

On behalf of the bank it was suggested that the Court ought not to enforce the subpœna because it was issued in the course of a proceeding under s. 5 of the Extradition Act, 1873, and a very strong criticism upon the statute by a great authority on such a question, Sir Edward Clarke, was read. That criticism does not seem to me to be anything more than one directed against the statute. I am not so sure that we can accept the statement without qualification that no use has been made of the statute; but be that as it may, we have to obey the statute, and are not allowed to decline to obey it even if we did not approve of it. But I really see no reason why it should not be regarded as being a proper Act of Parliament when we remember

that for very many years civilized nations have been endeavouring to prevent criminals from escaping from justice—apart from political offences—by quitting the country to the laws of which they are amenable.

On behalf of the bank it was said that even if this had been a prosecution for an indictable offence the bank would not have been bound to produce it. I am of opinion that there would be no answer to a subpœna duces tecum to produce a sealed envelope if there were a charge of fraud brought in this country against a person who had deposited it in his own name and that of the person who alleged that he had been defrauded, and that the deposit was one of the steps, so to speak, in the commission of the offence, and that the production of it was necessary to prove the offence. I am therefore of opinion that the subpœna must be obeyed and that the bank had no answer to it. I give no directions to the magistrate as to how he will deal with the document or what he will do with it. He is competent to deal with that matter when it arises.

On behalf of the bank it was also contended that an order ought not to be made for the issue of a writ of attachment because there had been no wilful disobedience by the bank. It is perfectly true that there has not been any wilful disobedience on the part of the bank. On the contrary, it has acted perfectly properly in order to protect itself and the interests of those of whose property it is the custodian. The bank asks for the protection of the Court. But it is quite clear that in *Reg.* v. *Lord John Russell* (1) no doubt whatever was thrown upon the power of the Court to enforce obedience by attachment. Lord Denman C.J. in the first part of his judgment held that the documents were not material and could not be given in evidence. In the second part of the judgment he said that an attachment would not issue where there had not been some disobedience. In one sense declining to produce a document, having it in Court, if there is no legal justification for the refusal to produce it, is contempt. No question analogous to that where a witness claims privilege from the production of documents on the ground that they are his title deeds arises here. Nobody means that

(1) 7 Dowl. P. C. 693.

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any officials of the bank are in fact to be attached, but the proper order to make will be that the rule be made absolute, and the writ of attachment will lie in the office for a month.

RIDLEY J. I agree.

DARLING J. I am of the same opinion. On behalf of the bank several points have been raised upon which I think it desirable to say a few words. It appears to me that a document must be produced to the Court if a subpœna be served upon a person who has it. I cannot see that a subpœna may be disobeyed because the document happens to be enclosed in something, as in an envelope, or even in a bag or box. If it were otherwise any person might say, "I am at liberty to disobey the subpœna to bring the document if I simply take the precaution of putting my document into an envelope or into a bag and keeping it there." When the document is brought to the Court, what use the Court will order to be made of it is an entirely different matter. On behalf of the bank it has been contended that the sealed envelope and what is inside it does not come within the term "document." I think that it is perfectly plain that the sealed envelope itself might be a document. Nothing but the sealed envelope might be required. But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence.

Rule absolute.

Solicitor for applicant: *Treasury Solicitor.*
Solicitor for respondent: *W. H. Sidebotham.*

J. E. A.

BROOK *v.* MELTHAM URBAN DISTRICT COUNCIL.

1908
April 28, 29.

Sewer—Facilities for Manufactories draining into—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

By s. 7 of the Rivers Pollution Prevention Act, 1876, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers; . . . . Provided . . . . that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district":—

Held, that the word "sewers" in the proviso refers only to the pipes in which the sewage is received, and not to the sewage system as a whole. It does not include apparatus used for purifying the sewage previously to its discharge into a river.

Guthrie & Co. v. *Brechin*, (1888) 15 R. 385, followed.

Appeal from the Huddersfield County Court.

The defendants, as the sanitary authority for the Meltham district, were possessed of a sewage system. The sewage of the district was received by the defendants into and carried along sewage pipes to certain purification works, where it was treated by a process known as the Polarite Bacterial Oxidization System. The treatment consisted in causing the sewage to pass upwards through a bed of broken stone four feet thick into a series of open concrete channels, where it was partially oxidized by exposure to the air. From these aerating channels it was carried by pipes to an automatic revolving apparatus, by which it was sprinkled over the surface of a filtering bed four feet thick, consisting of layers of clinker, a substance called polarite, and broken stone. The passage of the sewage through this bed further oxidized it. After being rendered innocuous by this treatment the effluent was carried along further pipes by the defendants and discharged into a river.

The plaintiffs, Jonas Brook & Brothers, Limited, cotton thread manufacturers at Meltham Mills, within the defendants' district, requested the defendants to give them facilities for enabling them to carry the liquids resulting from the manufacturing processes at their mills into the defendants' sewers in

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accordance with the provisions of s. 7 of the Rivers Pollution Prevention Act, 1876. (1) The defendants having refused to give the facilities asked, the plaintiffs brought the action in the county court, under s. 10 (2) of the said Act, for an order that they should be at liberty to carry their liquid refuse into the sewers. The amount of the liquid refuse from the plaintiffs' mills which they claimed that the defendants should receive was about 65,000 gallons per day. The amount of the ordinary sewage with which the defendants had to deal was about 90,000 gallons per day. The defendants' sewage pipes were of a sufficient diameter to carry much more than the 65,000 gallons which the plaintiffs required the defendants to receive in addition to the 90,000 gallons of ordinary sewage, but the defendants' purification works were incapable of dealing with more than 120,000 gallons. The county court judge was of opinion that the word "sewers" in the proviso to s. 7 included not only the pipes for carrying the sewage, but the whole sewage system, and that, as that system as a whole was only sufficient for the requirements of their district (3), the defendants were under no obligation to afford the facilities asked for. He accordingly dismissed the claim.

The plaintiffs appealed.

(1) By s. 7 of the Rivers Pollution Prevention Act, 1876, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers; . . . . Provided . . . . that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district."

(2) Sect. 10: "The county court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified."

Sect. 20: "In this Act . . . . "Person" includes any body of persons whether corporate or unincorporate."

(3) The plaintiffs claimed that the defendants should receive the whole of their liquid refuse. They did not ask that, in the event of that claim being ill-founded, the defendants should receive so much of it as represented the difference between the 90,000 and 120,000 gallons.

Danckwerts, K.C., and *Wilberforce*, for the plaintiffs. The judge was wrong in holding that the insufficiency of the defendants' disposal works to deal with the additional liquid from the plaintiffs' mills relieved the defendants from their obligation to receive it. The word "sewers" in the proviso to s. 7 means sewers in the ordinary sense of the term, namely, the pipes used for conveying the sewage away. It does not include purification or disposal works. Even before the Act of 1876 manufacturers had the right of discharging their refuse into the public sewers under s. 21 of the Public Health Act, 1875, subject to the sole condition of complying with the authority's regulations with respect to the mode of connection. Under that Act sewers are treated as distinct from sewage works. The former are dealt with in ss. 13—26. The latter are dealt with under the head of "disposal of sewage" in s. 27. And in *King's College, Cambridge* v. *Uxbridge* (1) it was held that an engine-house with pump and machinery for forcing the sewage up a rising main to an outfall for treatment was not a sewer within s. 16, but a work for the purpose of "receiving or otherwise disposing of sewage" within s. 27. The word "sewer" must have the same meaning in the Act of 1876 as in that of 1875. But the point is directly covered by authority. The Act of 1876 applies to Scotland as well as to England, and in Scotland it has been held in *Guthrie & Co.* v. *Brechin* (2) that "the measurement of capacity referred to in the Act is not the ability of the town to dispose of the sewage after it has passed through the pipes, but the capacity of the pipes to receive it."

Scott Fox, K.C., and *Lowenthal*, for the defendants. The object of s. 7 of the Act of 1876 is not to impose an obligation upon the local authority of providing sewers sufficient to deal with the applicants' sewage. It only applies to existing sewers. But it occurs in an Act dealing with the prevention of the pollution of rivers; and, that being the object of the Act, the word "sewers" must mean the whole sewage system by which the sewage is carried from the house to the river. The sewer ends at the point where the local authority finally discharge it into the river, and as they cannot lawfully so discharge it into the river without first

(1) [1901] 2 Ch. 768. (2) 15 R. 385.

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purifying it, the "sewers," the sufficiency of which for the requirements of the district has to be considered, must include the purification works. The section means that if the manufacturer's refuse can be received and dealt with by means of the existing sewage system, and without additional expense to the local authority, he is entitled to carry it into the sewer. But if the existing system is insufficient for that purpose the manufacturer must provide his own means of disposing of his refuse. There seems to be no reason for relieving the authority from their obligation to receive the refuse where their pipes are of an insufficient diameter, which does not equally apply where the disposal works are insufficient to purify it, for the one part of the system is the necessary complement of the other. The word "sewer" is a word of very wide meaning. In s. 4 of the Public Health Act it is defined to include "sewers and drains of every description" (except drains used to drain a single house); it includes every carrier of sewage. And a means of carrying the sewage to the river is not the less a sewer because the sewage is made to deposit some of its solid matter in the course of its passage. No doubt a cesspool or reservoir made for the purpose of retaining the sewage is not a sewer. "A sewer means in the Act of Parliament something that carries sewage away": *Meader* v. *West Cowes Local Board.* (1) But where the sewer passes through a cesspool in its course, using it as a catchpit, the cesspool may be well regarded as part of the sewer: *Pakenham* v. *Ticehurst* (2); and that is the position occupied by the treatment works here. The case of *Guthrie & Co.* v. *Brechin* (3) is distinguishable, upon the ground that there the sewage was treated by means of a sewage farm:—it was allowed to penetrate in the soil; there was no artificial apparatus for its treatment—nothing that could without a straining of language be called a sewer. But here there is a highly artificial apparatus, consisting largely of pipes, which might be well regarded as part of a sewer. But even if the apparatus could not fairly be treated as part of a sewer, and if, consequently, this case cannot be distinguished from *Guthrie's Case* (3), it is contended that that case was wrongly decided.

(1) [1892] 3 Ch. 18. (2) (1903) 67 J. P. 448.
(3) 15 R. 385.

Being the decision of a Scottish Court, it is not binding here. In *Pasmore* v. *Oswaldtwistle* (1) Lord Halsbury treated the word "sewers" in s. 7 as equivalent to "drainage system" and as including the purification works. He there said: "It"—the Act—"provides that there shall be an outlet in some form or other for what I may call manufactory refuse; but contemplating the case which might readily arise where some manufacturer would be very glad to throw upon the rates the necessity of getting rid of his own refuse, it provides also with reference to that obligation to get rid of the refuse, that where the drainage system of a district is 'only sufficient for the requirements of their district,' there shall not be an obligation to get rid of the refuse of a manufacturer who ought to get rid of the refuse which he is himself creating." That passage directly supports the defendants' contention.

Danckwerts, K.C., in reply. The suggested distinction between *Guthrie & Co.* v. *Brechin* (2) and the present case is not substantial. The movement of the sewage along the channels and pipes of the treatment works was merely incidental to the treatment. The object of the treatment, as in the case of the sewage farm, was the purification of the sewage. The passage cited from Lord Halsbury's judgment in *Pasmore* v. *Oswaldtwistle* (1) was a dictum only. Since that case it has been held in *Eastwood Brothers* v. *Honley* (3) that it is no answer to the claim of a manufacturer to send his trade effluent into the local authority's sewer that the area at the authority's disposal for the purpose of irrigation is insufficient.

CHANNELL J. In this case I think we must take the facts to be that, the manufacturers having by proper notices required that facilities should be given them for taking into the sewers of the defendants the liquid refuse from their manufactory, and having appealed to the county court from the defendants' refusal, the county court judge has found that the pipes of the sewers were capable of carrying this additional quantity of liquid, but that the works for the treatment of the sewage before it flowed into the

(1) [1898] A. C. 387, at p. 396. (2) 15 R. 385.
(3) [1901] 1 Ch. 645.

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Channell J.

river were insufficient to deal with it. There was evidence on which he could have so found, and we must therefore deal with the case upon the footing of those being the facts. Now the question arises upon the construction of s. 7 of the Rivers Pollution Prevention Act, 1876. That section, which directs the sanitary authority to afford facilities for enabling factories to drain into the authority's sewers, contains a proviso "that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district." Those latter words clearly mean sufficient for the requirements of their district apart from the quantity proposed to be sent in by the particular manufacturer who is making the application. But the question to be determined is what is the meaning of the words "sewers of such authority," as to which we have to consider whether they were only sufficient for the requirements of the district. The plaintiffs contend that they mean the sewers proper, the pipes along which the sewage is carried, and that they do not include the works for the treatment of the sewage before it flows into the river. The defendants, on the other hand, contend, and their contention was upheld by the county court judge, that the word "sewers" includes all the artificial structures used for the purpose of carrying away the sewage from the point where the sanitary authority receive it to the point where they eventually pour it into the river and it passes out of their control; that it covers the whole sewage system so far as it consists of artificial structures through which the sewage flows, including purification works whereby the sewage is treated in the course of its passage, though possibly it would not cover an ordinary sewage farm, where the sewage merely percolates through the earth. This latter contention is in my opinion one for which there is a great deal to be said, having regard to the obvious policy of the Act. Its object, as its title indicates, is to prevent the pollution of rivers, and in pursuance of that object it prohibits a manufacturer from sending his refuse directly into the river in an unpurified condition, and, partly in order to ensure his not doing so, it contains this clause as to the authority giving him facilities for carrying away that refuse. That right to use the public sewers

for the purpose of discharging liquid refuse from factories into them had already been given by the Public Health Act; and the effect of the proviso in s. 7 is to restrict that right. It seems to me that, looking at the policy of the Act, the proviso must mean that while recognizing the manufacturer's right to pour his refuse into the sewer it limits the exercise of that right to cases in which the sewage system is sufficient to allow of the refuse being disposed of with the sewage proper as that is already disposed of, and, if that has to be purified, then sufficient for the whole to be purified before being discharged into the river. If the sewage system was not sufficient for that purpose, there was no more reason why the manufacturer should be at liberty to call on the ratepayers of the district to provide new purification works than to call on them to enlarge the pipes of their sewers. Looking at the matter, therefore, as one of policy, and apart from authority, I should say there was very strong reason for holding that the word "sewers" meant the sewage system. But I am not at liberty so to hold. The very point has directly arisen before the Court of Session in *Guthrie & Co.* v. *Brechin* (1), and it was held that the word "sewers" referred to the pipes in which the sewage was received, and not to the disposal works where it was dealt with after it had passed through the pipes. It was indeed sought by Mr. Scott Fox to distinguish that case upon the ground that there the sewage was treated by means of an ordinary sewage farm, which could not by itself, and except as part of a larger system, be said to come within the designation of a sewer; whereas here the purification of the sewage to a large extent takes place during its passage along the pipes of which the treatment apparatus is composed. But I do not think that that is a substantial distinction, because the main object for the use of those pipes, although the sewage flows through them, is not that it should flow, but that it should be treated. In one sense that decision is not binding on us; but, inasmuch as the Act is one which applies to Scotland as well as to England, it is highly desirable that the law should be laid down in the same way in both countries, and on that ground, although we may not strictly be bound by the decision, it is desirable that we should follow it.

(1) 15 R. 385.

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But the matter does not rest there, for the precise point has also been dealt with in the same way in the Court of Appeal in *Eastwood Brothers* v. *Honley.* (1) No doubt it was not there necessary to decide the point, but Rigby L.J. distinctly pointed out that the objection of the local authority to the then plaintiff bringing his effluent into the sewer depended not on the insufficiency of the sewers proper, but upon the insufficient area of the land which they had got at their disposal for the treatment of the sewage, and that in his opinion that objection was not a valid one. Therefore we have two authorities expressly dealing with the point before us, and both saying that in the proviso to s. 7 the words "sewers of such authority" must be read as referring to the sewers proper and not to the sewage system generally. I therefore think that the appeal must be allowed.

SUTTON J. I agree with the judgment of the Lord President in *Guthrie & Co.* v. *Brechin.* (2)

Appeal allowed.

Solicitors for plaintiffs: *Mills & Co., Huddersfield.*
Solicitors for defendants: *Learoyd & Co., Huddersfield.*

(1) [1901] 1 Ch. 645. (2) 15 R. 385.

J. F. C.

JOSOLYNE *v.* ROBERTS.

1908
April 30.

Prohibition—Mayor's Court—Alternative Modes of Proof, one shewing Jurisdiction, the other not.

The maker of a promissory note which was expressed in the body of it to be payable at an address within the city of London was sued upon the note in the Mayor's Court. Neither plaintiff nor defendant resided or carried on business within the City, nor did any part of the cause of action arise within it, except the fact that presentment at the address named was, unless waived, necessary to render the defendant liable:—

Held, that although the plaintiff's case might be established by proving waiver of presentment, and therefore without shewing that any part of the cause of action arose within the jurisdiction, upon the plaintiff undertaking to rely upon presentment in the City and not upon waiver, an order for prohibition ought not to be granted.

Appeal from an order of Ridley J. at chambers ordering prohibition to the Mayor's Court.

The action was brought in the Mayor's Court to recover a sum of 11*l.* 4*s.* 4*d.* due on four promissory notes made by the defendant. The plaintiff, Anna Josolyne, was a money-lender residing and carrying on business at 56, Chancery Lane, outside the jurisdiction of the Mayor's Court. The defendant was a clerk employed at the Law Courts in the Strand and residing at Balham. The notes were all expressed in the body of them to be payable at 15, Fleet Street, E.C., which is a public-house known as the Rainbow Tavern. By s. 87 of the Bills of Exchange Act, 1882, "Where a promissory note is in the body of it made payable at a particular place it must be presented for payment at that place in order to render the maker liable." The plaintiff relied on the place of presentment as giving the Court jurisdiction. The plaintiff's manager in his affidavit stated that the reason why the notes were made payable at 15, Fleet Street was that the defendant did not wish them to be presented for payment at the office where he was employed; he also stated that the notes were in fact presented at 15, Fleet Street. The defendant, on the other hand, said that the place of payment in question was inserted in the notes because it was the plaintiff's ordinary practice to make the notes payable there in order to give the

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Mayor's Court apparent jurisdiction. According to his account he attended at 15, Fleet Street at the time arranged, but the plaintiff did not appear, and he alleged that the notes were in fact presented for payment at the Law Courts. Ridley J. at chambers was of opinion that the insertion of the place of presentment was a sham in the sense that it was never intended that the notes should be presented there, and he ordered a writ of prohibition to the Mayor's Court to be issued. The plaintiff appealed.

Vachell, K.C., and *Moyle*, for the plaintiff. The effect of ss. 12 and 15 of the Mayor's Court Procedure Act, 1857, was to give the Court jurisdiction in claims under 50*l.* where part of the cause of action arose within the jurisdiction: *Hawes* v. *Paveley*. (1) Then here part of the cause of action did arise within the jurisdiction, for the plaintiff, in order that he may succeed, must prove presentment at 15, Fleet Street, the language of s. 87 of the Bills of Exchange Act being express to the effect that without such presentment the maker is not liable. The plaintiff's motive for naming that place of presentment is perfectly immaterial.

A. M. Talbot, for the defendant. In the event of the plaintiff failing to prove presentment at 15, Fleet Street she may rely on waiver of presentment under s. 46, in which case she will not prove any part of her cause of action to have arisen within the City.

Vachell, K.C., in reply. The plaintiff will undertake not to rely upon waiver of presentment. Such an undertaking is sufficient to justify the Court in refusing prohibition. In *Ellis* v. *Fleming* (2), where the action was on an attorney's bill of costs, certain items of which were in respect of work done outside the City, it was held that on the plaintiff consenting to abandon those items prohibition ought not to issue.

CHANNELL J. In this case I have some doubt whether the prohibition ought to issue or not. The notes sued upon were made payable at an address within the City. Presentment

(1) (1876) 1 C. P. D. 418. (2) (1876) 1 C. P. D. 237.

therefore at that address is by virtue of s. 87 of the Bills of Exchange Act a material part of the cause of action, such presentment being prima facie necessary to render the maker liable. But then it is equally clear that presentment, even in cases in which it is prima facie necessary, may be waived. The result is that the plaintiff might succeed in the action without proving presentment. It is this fact of her having alternative modes of proving her case, one of them shewing jurisdiction and the other not, that has made me doubt whether prohibition should go. Then how is that affected by the fact that the plaintiff has set up as her case the alternative which does involve proof of facts within the City? She says that she has set up that case, but, unless we put her under an undertaking, I think she would be at liberty at the trial to fall back upon the other. I think, on the whole, that the proper course is to discharge the prohibition upon the plaintiff giving an undertaking that she will not set up in the Mayor's Court that which she now asserts she does not propose to set up, namely, that presentment was dispensed with, but will rely upon proof of presentment at 15, Fleet Street, and will consequently prove, as part of her cause of action, a fact shewing jurisdiction in that Court.

SUTTON J. I agree.

Appeal allowed.

Solicitor for plaintiff: *F. Ridley.*
Solicitor for defendant: *Scholefield.*

J. F. C.

1908
May 2, 4.

BAKER *v.* SNELL.

Savage Dog—Keeping with Knowledge of Vice—Intervening Act of Third Person causing Dog to bite—Liability of Owner—Remoteness of Damage.

The defendant was the owner of a dog known by him to be savage. A servant of the defendant who was entrusted with the custody of the dog incited it to attack the plaintiff, and thereupon the dog flew at and bit the plaintiff: —

Held by Channell J., that (apart from consideration of the fact that the person so inciting the dog was the defendant's servant) the defendant could not be held liable for the injury inflicted, inasmuch as the keeping of the dog was not the proximate cause of the injury; but that there was evidence from which a jury might infer that the act of the servant was done in neglect of his duty as custodian of the dog, and that his master was therefore liable.

By Sutton J., that, as the gist of such an action is the keeping of the animal with knowledge of its vicious propensity, the defendant kept it at his peril, and was liable for any injury done by it, even though the injury was brought about as the result of the wilful act of a third person.

Appeal from the Bow County Court.

The plaintiff was a housemaid in the employment of the defendant, a licensed victualler. The defendant kept upon his premises a dog which was known by him to be savage. It was the duty of the defendant's potman to let the dog out early in the morning, and then chain it up again before the plaintiff and the barmaids came downstairs. On the occasion in question the potman brought the dog into the kitchen, where the plaintiff and the barmaids were at breakfast, and said, "I will bet the dog will not bite any one in the room." He then let the dog go, and said "Go it, Bob." The dog then flew at the plaintiff and bit her. It had previously bitten the plaintiff and other persons to the defendant's knowledge. The county court judge held that the act of the potman was in fact an assault, for which the defendant was not liable, and he accordingly nonsuited the plaintiff. The plaintiff appealed.

Head (*Profumo* with him), for the plaintiff. A person who keeps an animal known to be dangerous keeps it at his peril.

The gist of the action is the keeping it after knowledge of its mischievous propensities: *May* v. *Burdett*. (1) It is a wrongful act to keep such an animal at all, and the owner is responsible for any damage resulting from its escape, even though its escape may have been brought about by the wilful act of a third person. In *Nichols* v. *Marsland* (2) Bramwell B. suggested that even the fact of a dangerous animal's escape being due to the act of God would afford no excuse.

Abinger, for the defendant. The injury was too remote. The keeping the dog was in the circumstances of the case not the causa causans of the injury, but only the causa sine qua non, and it is the former that has to be looked at. In *Hadwell* v. *Righton* (3), where a fowl which was wrongfully straying on a highway was frightened by a dog and flew into the spokes of the plaintiff's bicycle and upset him, it was held that the damage was too remotely connected with the fowl's presence on the highway to render its owner responsible. The defendant here could not have contemplated that the potman, whose duty it was to keep the dog securely, would set it on to a fellow-servant.

Head, in reply. The evidence was that the dog was extremely savage, and it may well be that the dog, which had bitten the plaintiff before, when once loose would bite her again without any words of incitement from the potman; and in that case the act of the potman may not have contributed to the injury. The case ought at all events to have been left to the jury to determine that question. Moreover, the defendant may be liable upon another ground. Even if the potman did cause the dog to bite the plaintiff, he was not a stranger, but the defendant's servant, and it was his duty to look after the dog. And for the potman's careless manner of discharging that duty the defendant may be held liable as the potman's master.

CHANNELL J. This case raises a very nice point which is not free from difficulty. The action is for damages for injury caused by the bite of a dog belonging to the defendant. The plaintiff was a maidservant in his employment. He had had the dog for

(1) (1846) 9 Q. B. 101. (2) (1875) L. R. 10 Ex. 255.
(3) [1907] 2 K. B. 345.

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some time, and there was evidence on which the jury might have found that the dog was accustomed to bite mankind and that the defendant knew it. Indeed, the dog had bitten the plaintiff herself before. It appeared that the defendant was in the habit of entrusting the dog to his potman with directions to take it out for a run early in the morning and then bring it back and chain it up before the maidservants were down. One morning he took it into the kitchen where the plaintiff and the defendant's other servants were at breakfast, and, presumably by way of a foolish practical joke, said, "I will bet the dog will not bite any one," and then, "Go it, Bob," whereupon the dog bit the plaintiff. On those facts the judge nonsuited the plaintiff upon the ground that the proximate cause of the injury was the wilful act of the potman, which in his opinion amounted to an assault. His view was, that although the defendant's act in keeping the dog with knowledge of its savage nature was a wrongful act in the sense that he kept it at his peril, still under the circumstances it was the potman and not the dog who did the damage, and that the keeping of the dog was only the causa sine qua non. Whether that view is correct is a question which depends upon the extent of the liability of a person who keeps a wild beast, for a dog known to be savage stands on the same footing as a wild beast. And with regard to a wild beast, Bramwell B. in *Nichols* v. *Marsland* (1) said that, if lightning broke its chain so that it escaped, the owner would be liable for any damage which it did in consequence of its escape. That was a dictum only, no doubt, and it appears to be unsupported by other authority, probably for the reason that no animal was in fact ever so released. But so far as it goes the dictum does tend to support the view that the liability of the keeper of a savage animal does extend to damage directly brought about through the intervening voluntary act of a third person. However, I do not accept that view myself. I cannot agree that the liability covers the unauthorized and wilful act of a third person. For instance, if a thief had got into the defendant's yard and been followed there by a policeman, and the thief happening to know the dog's name had set it on to the policeman, it could not be contended that the defendant would

(1) L. R. 10 Ex. 255.

be liable. The damage would not be the result of the defendant's act. If, then, the potman here had been a stranger to the defendant I should be prepared to uphold the county court judge's decision. But the potman was the defendant's servant, and was entrusted by him with the custody of the dog. Instead of performing his duty of keeping the dog securely, he incited it to fly at the plaintiff. The question whether the defendant is liable for that depends upon whether the man's wrongful act was done in the course of his employment, or whether it was done for purposes of his own. If it could be shewn that the man did it maliciously to gratify some grudge against the plaintiff, his master would not be liable. But there was no evidence of that. In my view the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe; and if that is the right view the defendant would be responsible. But the question is one of fact which ought to have been left to the jury. There is also another ground on which the case ought to be submitted to the jury. It would be open to them to find that the dog bit the plaintiff by reason of its savage nature, and by reason of that alone, and that the act of the potman had nothing to do with the result. I think, therefore, that the judge was wrong in nonsuiting, and that there must be a new trial.

SUTTON J. I have come to the same conclusion. The case of *May* v. *Burdett* (1) establishes that the gist of the action is the keeping of the animal after knowledge of its vicious propensity. It is there said that the owner "is bound to keep it secure at his peril" (2), by which I understand the Court to have meant that he is liable for any injury caused by the animal biting a person under whatever circumstances the biting may have taken place, except where the plaintiff by his own conduct has brought the injury upon himself. As it is not open to us to assess the damages I agree that the case must go back.

Order for a new trial.

Solicitor for plaintiff: *H. F. Strouts.*

Solicitor for defendant: *Philbrick & Co.*

(1) 9 Q. B. 101. (2) 9 Q. B. at p. 112.

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March 5, 6, 18.

[IN THE COURT OF APPEAL.]

MIDLAND RAILWAY COMPANY *v.* MYERS, ROSE & CO., LIMITED.

Railway—Siding Accommodation—Rates and Charges—Reasonableness—Provisional Order of Board of Trade—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxix.*).

The schedule of maximum rates and charges annexed to a provisional order of the Board of Trade with reference to the plaintiff railway company fixed as the maximum charge for any accommodation or services rendered by the company within the scope of their undertaking by the desire of a trader and not otherwise provided for by the schedule such reasonable sum as the company might think fit. The railway company gave notice to a firm of coal merchants that in future they would make a charge of 6*d.* per day per waggon in respect of all waggons remaining on their wait order sidings beyond a specified time, but notwithstanding this notice the firm continued to use the company's sidings and to keep their trucks there beyond the specified time. In an action against the firm before a special jury for siding rent on the footing of the notice Lawrance J. withdrew the case from the jury and gave judgment for the plaintiffs on the ground of an implied contract by the defendants to pay the stipulated charge:—

Held, that the subject-matter of the action was within the schedule and that the question of the reasonableness of the charge was for the jury, and a new trial ordered.

Application by the defendants for judgment or a new trial.

The action was brought by the Midland Railway Company against a firm of coal merchants to recover 654*l.* for rent for the use of the plaintiffs' wait order sidings by the defendants' coal waggons at the rate of 6*d.* per waggon per day.

On July 1, 1905, the plaintiffs gave notice to the defendants that they would in future make a charge of 6*d.* per day per waggon in respect of all waggons remaining on the plaintiffs' wait order sidings beyond three days. The defendants protested against this charge and threatened to give up using the plaintiffs' sidings, but they did not act upon this protest, and had since continued to send their trucks to the wait order sidings. In every case they received notice from the plaintiffs of the arrival of the trucks stating that the charge would be made if they were

allowed to remain beyond a specified date, and they gave directions to the plaintiffs for the forwarding of the trucks to their ultimate destination. In many cases the trucks were allowed to remain beyond the specified time, so that the defendants became liable for the charge. This action was brought for arrears of the charges so incurred.

The principal defence was that these charges were in excess of what the plaintiffs were authorized by statute to charge for this accommodation.

The question turned upon the construction of Part IV. of the schedule of maximum rates and charges annexed to a provisional order of the Board of Trade confirmed by the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxix.), read in conjunction with s. 4 of the order.

Sect. 4 provided: "From and after the commencement of this Order the maximum rates and charges which the Midland Railway Company," and railway companies connected therewith in respect of the railways therein mentioned, "shall be entitled to charge and make in respect of merchandise traffic on the railways of the said companies, shall be the rates and charges specified in the schedule to this Order annexed, and shall be subject to the classification, regulations, and provisions set forth in the said schedule."

Part IV., which was headed "Exceptional Class," after enumerating in the column devoted to the description of the services several items, concluded as follows: "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule," and the charge to be made in respect of all the items was "Such reasonable sum as the company may think fit in each case."

This order was practically identical in its terms with a large number of orders issued by the Board of Trade about the same time to all the railway companies of the United Kingdom.

The action was tried in December last before Lawrance J. and a special jury. The learned judge withdrew the case from the jury and ruled that under the admitted circumstances a

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contract to pay the charges had been in fact made by the defendants with the plaintiffs, being of opinion that the case was covered by *London and North Western Ry. Co.* v. *Crooke & Co.* (1), and he ordered judgment to be entered for the plaintiffs with costs.

Lush, K.C., and *Bailhache, K.C.*, for the defendants. There was here no binding contract to pay this charge, because by the terms of the Act of Parliament and the provisional order the charge to be made by the company was limited to a reasonable sum. This charge falls within Part IV. of the schedule of maximum charges. It follows that the acceptance of the company's notice by the defendants merely bound them to pay such sum as was reasonable, and that is a question for the jury. The learned judge misapprehended the effect of *London and North Western Ry. Co.* v. *Crooke & Co.* (1) Bigham J. there held, first, that, looking at the matter without regard to the Act of Parliament, there was a common law contract to pay the amount of the charge, but, secondly, that the charge was within Part IV. of the schedule. *Stone & Co.* v. *Midland Ry. Co.* (2) is distinguishable because there the company had a free hand, inasmuch as the Court held that the charge in question in that case was not governed by any statute.

Cripps, K.C., and *Frank Gover*, for the plaintiff company. (1.) These charges are not within Part IV. of the schedule. Part IV. is confined to services which the company is bound to render, but the subject-matter of which is exceptional. Where a railway company offers a service which it is not bound by the statute to offer it stands in exactly the same position as a private individual. In such a case the company may fix such terms as it thinks fit, and it is for the other party either to accept or reject them. The charge in question is made by the company for the use and occupation of certain of its premises which are not concerned with the through traffic, and it is optional on the company whether they will grant this accommodation or not: *Great Western Ry. Co.* v. *McCarthy* (3); *Watson, Todd & Co.* v.

(1) (1904) 20 Times L. R. 506.

(2) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

(3) (1887) 12 App. Cas. 218, 235.

Midland Ry. Co. and London and North Western Ry. Co. (1); *Dickson* v. *Great Northern Ry. Co.* (2); *Stone & Co.* v. *Midland Ry. Co.* (3)

(2.) Assuming that these services are within Part IV., the maximum charge is not what the jury says is reasonable, but what the company thinks reasonable. The Legislature says the charge is reasonable so long as the company thinks it reasonable; it does not say the company may charge a fair and reasonable sum.

(3.) This charge is not confined to the use and occupation of the sidings, but includes the extra haulage necessary to send the trucks on to the sidings.

Bailhache, K.C., replied.

Cur. adv. vult.

March 18. COZENS-HARDY M.R. I have had an opportunity of reading the judgment about to be delivered by Fletcher Moulton L.J. and I agree with it.

FLETCHER MOULTON L.J. In the present case I think it must be taken that the claim of the railway company is solely in respect of their permitting the trucks of the defendants to remain on their wait order sidings beyond the period prescribed by their notice of July 1, 1905. An attempt was made to base their claim also on some extra haulage entailed by the practice of sending cars to these sidings, but such extra haulage is incidental to cases where no charge is made, just as much as to cases where the railway company seek to make a charge. The practice of marshalling the traffic on these sidings rather than elsewhere is obviously convenient to both parties, and the extra haulage thus necessitated has never been put forward as a justification for the charge by the railway company in the documents before the Court or otherwise. Nor can I find that either in the Court below or in the case before Bigham J. any such contention was put forward. I therefore think that we should not be doing justice if we yielded to the ingenious argument of the junior counsel for the respondents and treated other

(1) (1896) 9 Ry. & Ca. Tr. Cas. 90.
(2) (1886) 18 Q. B. D. 176, 186, per Lindley L.J.
(3) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

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matters than the accommodation at the sidings as forming part of the consideration for the charge. We have, therefore, to consider the case as though the charge was specifically for permitting the trucks to remain for more than a specified time in the wait order sidings, and the question for our decision is whether or not the plaintiffs are entitled to charge the defendants 6*d.* per day per waggon in respect of this accommodation. By an order of this Court made on appeal from an order of a judge at chambers the main issue in this case was directed to be tried by a special jury. But when it came on for hearing the learned judge withdrew it from the jury and ruled that in the admitted circumstances a contract to pay such charge had been in fact made by the defendants with the plaintiffs.

Assuming that both parties were entirely free to contract, there is in my opinion no doubt that the judge would have been justified in directing the jury to find that such a contract had in fact been made. By the notice dated July 1, 1905, the defendants were specifically informed that the railway company would in future make the charge in question. It is true that the defendants at first protested against the proposed charge being made and intimated to the railway company that they would not pay it, and even went so far as to direct the railway company to accept no traffic upon their behalf consigned to the wait order sidings if they intended to insist on the payment. But it was admitted by the counsel for the defendants that this protest was not acted upon, and could not in fact be acted upon compatibly with the continuance of the business of the defendants. Accordingly for nearly two years after that notice had been given the defendants continued to consign coal to the wait order sidings. In every case they received notice from the railway company of the arrival of the trucks at the sidings and that the charge would be made if they were allowed to remain there beyond a specified date, which date was in all cases properly calculated in accordance with the terms of the notice of July 1, 1905. Following on these notices the defendants regularly sent directions for the forwarding of the trucks so waiting at the sidings, and the railway company acted on the directions so given. After some months, during which this

course of business was regularly followed, the railway company sued the defendants for the charges payable on the terms of the notice of July 1, 1905, in respect of their not having sent such forwarding orders in time. The action came on for trial in the City of London Court and the plaintiffs recovered the sum claimed. The same course of business continued, and the present action is brought for arrears of charges subsequently accruing under similar circumstances. Had both parties been free to contract, no jury could, in my opinion, rightly give any other finding on these facts than that the defendants had accepted the terms of the railway company by continuing to consign their trucks to the wait order sidings and subsequently giving the requisite orders for distributing them, and, that being so, the judge would have been fully entitled, and indeed bound, to direct them to find that such a contract did in fact exist between the parties.

The matter, therefore, reduces itself to the simple question —Aye or No, were the railway company free to make such a contract with the defendants? If the charge was greater than that which they were authorized by statute to make for the services rendered there would be no consideration for the excess, and the defendants would not be liable for more than the statutory charge. But if they were free to fix such charge as they thought fit for the services rendered the case of the defendants must fail. This case, therefore, appears to me to turn entirely upon the question whether the charge of 6*d.* per day for each truck remaining beyond the specified number of days in the wait order sidings was or was not in excess of the maximum rate (if any) which the railway company had a right to charge for the accommodation given. This depends on the true interpretation of the provisions of the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, a statute which in form is a special Act of the Midland Company, but in truth is an Act of general application (except so far as the actual amounts of the charges are concerned), inasmuch as identical statutes relating to each of the other railways in the United Kingdom were passed at or about the same date and came into force on the same day. These

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statutes were for the purpose of carrying into effect the conclusions of the Commission which had been sitting upon the question of railway rates, and constituted, as it were, a new departure in respect of the rates permitted by the Legislature to be charged by the railways of this country.

After considering carefully the language of the order, which was confirmed by the Act, I am of opinion that it was intended to be a complete code of maximum rates with regard to merchandise traffic conveyed by the Midland Railway Company on its own line or on the lines of certain subsidiary companies in which it had an interest, excepting where it expressly provides to the contrary. This follows from the express language of s. 4 of the order, which reads as follows: "From and after the commencement of this Order the maximum rates and charges which the Midland Railway Company . . . . shall be entitled to charge and make in respect of merchandise traffic on the railways of the said companies shall be the rates and charges specified in the schedule to this Order annexed, and shall be subject to the classification, regulations, and provisions set forth in the said schedule." It thus appears that it purports to deal with all the rates and charges "in respect of merchandise traffic on the railways of the said companies," and I have no difficulty, therefore, in coming to the conclusion that no rate can be charged by the Midland Railway Company in respect of merchandise traffic on its railways which is not within the maximum prescribed by such order. It was strongly pressed upon us that the order did not apply to services which the railway company were not compellable to render, and it was claimed that with respect to such services they were in the same position as ordinary traders and could make such contracts as they chose, and in support of this contention the cases of *Stone & Co.* v. *Midland Ry. Co.* (1) and *Watson, Todd & Co.* v. *Midland Ry. Co. and London and North Western Ry. Co.* (2) were quoted. I cannot accept the contention, nor do I think that either of the two cases referred to supports it. If the schedule be carefully examined numerous instances will be found

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.
(2) 9 Ry. & Ca. Tr. Cas. 90.

in which rates for voluntary services are dealt with and their amount limited. For example, in s. 5 we have many such services enumerated, such as "services rendered by the company at or in connection with sidings not belonging to the company," "the collection or delivery of merchandise outside the terminal station," &c., and s. 9 deals with the provision of trucks for the conveyance of merchandise in such cases as those which are included in class A, where the charge for trucks is not included in the maximum rates specified, and where the company cannot be required to provide such trucks. The general proposition contended for by the railway company cannot, therefore, be supported, and a closer examination of the schedule leads me to the conclusion that maximum charges for all services within the scope of the undertaking of the company are provided for in it, except in one or two cases which are expressly excepted. The case of *Stone & Co.* v. *Midland Ry. Co.* (1) illustrates one of these exceptions. The carriage of perishable merchandise by passenger train is provided for in Part V. But the charges in *Stone's Case* (1) were for the conveyance by passenger train of non-perishable merchandise. Now s. 27 of the schedule reads as follows: "The foregoing provisions shall, so far as applicable, apply to merchandise when conveyed by passenger train under Part V.; but, save as aforesaid and so far as is provided by Part V., nothing herein contained shall apply to the conveyance of merchandise by passenger train, or to the charges which the company may make therefor." The "free hand to contract," therefore, for which the railway company contend, was indeed possessed by them in the circumstances to which the case of *Stone & Co.* v. *Midland Ry. Co.* (1) relates. But they possessed it not by reason of the general principle contended for, but by reason of the above special exception in their favour under the circumstances of that case. The case of *Watson, Todd & Co.* v. *Midland Ry. Co. and London and North Western Ry. Co.* (2) illustrates another exception. It relates to charges for services which included matters outside the scope of the undertaking of the company, namely, acts performed neither on

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.
(2) 9 Ry. & Ca. Tr. Cas. 90.

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their railways nor on sidings of those railways belonging to other persons. These services consisted in making provision for the conveyance of merchandise upon railways not belonging to the company and its delivery at stations not on their lines, and the Court naturally held that the railway company were entitled to charge for these wholly extraneous services rendered by them through their agents off their system at such prices as they thought fit. They were outside the language of s. 4 of the order and of Part IV. of the schedule. Neither of these cases, therefore, supports the contention of the railway company that where services are rendered on the system of the railway company itself but are not obligatory there is entire freedom of contract.

I will now proceed to examine the terms of the Act in order to ascertain what its provisions are with regard to the maximum charges for such services as those with which we have to deal in the present case. The actual maximum rates and charges are set out in a schedule which is divided into six parts, which must be read in connection with the introductory sections, which are twenty-eight in number. Of these sections the one that is most important for our purpose is the first, which specifies the character of each of the six parts into which the schedule is divided. It speaks of Parts I., II., and III. as containing the maximum rates and charges authorized in respect of the articles carried, which in the case of Part I. consist of various classes of merchandise, and in Parts II. and III. of animals and carriages. But when it speaks of Part IV. it changes its language. It no longer refers to the subject of the conveyance, but to the circumstances under which the charge may be made. The exact language is as follows: "Part IV., specifying the exceptional charges mentioned in such part, and the circumstances under which they may be made." It then goes on to describe Part V. and Part VI., partly as referring to the special articles conveyed and partly to the provisions and regulations applying thereto. When we turn to the schedule itself we find that this description is quite accurate. Parts I., II., and III. deal with special classes of merchandise and specify the maximum rates for conveyance and terminal charges in respect of them. Part V.

refers to the carriage of perishable merchandise by passenger train, and Part VI. to small parcels by merchandise train. On the other hand Part IV., with which we have to deal in the present case, is headed "Exceptional Class," and it specifies, in a way to which I will presently refer more in detail, the charges to be made under exceptional circumstances. These circumstances are in most cases due to the exceptional character of the articles conveyed, but in the last item in the schedule the charges are expressed to be due to accommodation or services rendered at the desire of the trader, without specifying or limiting any class of merchandise to which they refer. It is under this last item of Part IV. of the schedule that in my opinion the charge in the present case comes. The exact description given in the schedule for this item is, "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule." And the maximum charge which the company are authorized to make in respect of this item is thus described: "Such reasonable sum as the company may think fit in each case."

Counsel for the company contended that the whole of this schedule related to things obligatory on the company. But it is obvious that this cannot be the case. One item is for "dangerous goods." The railway companies are specially exempted by statute from any obligation to carry dangerous goods. Therefore this part of the schedule cannot be restricted to obligatory services. To my mind it is clear that the Legislature intended in this part of the schedule to fix a maximum charge for services rendered which were not obligatory, but which the railway company were able to render by means of their undertaking which had been created by them under and by means of statutory assistance, and I can see nothing unfair or unreasonable in the Legislature putting limits to the charges to be made for such services, provided that the maximum which it fixes in regard to them is not unreasonably low. The freedom accorded by the Legislature to the railway companies in respect of such services rendered upon their system is rarely, if ever, an

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absolute freedom. I doubt whether any railway would be allowed to shew undue preference to any body of men in respect of any such services. Whether they were obligatory or not, a railway company would have great difficulty in supporting a charge which was different according to whether the consignor held one type of political views or another, or even according to whether he was a shareholder in the company or not. That the limitations imposed by the Legislature on the charges to be made in respect of items appearing in Part IV. are reasonable is not open to doubt. For the only limitation is that they shall be reasonable. But this is a real limitation. Whether or not they are reasonable is a question of fact, and in case of difference it must be decided, as in the case of all other differences affecting the rights of parties, by the tribunals of the land. Accordingly a consignor who has received from the railway company services within Part IV. of the schedule is entitled to challenge the reasonableness of the charge made in respect of them, and to have that issue, if necessary, tried by a jury, unless there is some legislation which remits it to a special tribunal. In this case the Court made an order that it should be tried by a special jury, and, in my opinion, the judge was not entitled to withdraw it from them.

I do not desire that anything I have said should be interpreted to mean that the jury was not entitled in deciding this issue to take into consideration the conduct of the parties, including the fact that the defendants had continued to consign their coal to the wait order sidings after receiving notice of the charge which the railway company intended to make in respect of delay in giving the requisite forwarding orders. But the defendants were entitled, if they could do so, to shew that, from the nature of the business, the essentiality of the employment of the system of wait order sidings was so absolute that they had no effective choice, and that they must either send their consignments to these sidings or stop business. In the presence of such evidence as this the jury might be entitled to say that the conduct of the defendants was not conclusive as to the reasonableness of the charge. If it was not conclusive as to the fact of reasonableness, it could not, in

my opinion, amount to a waiver of the right of the defendants to challenge the reasonableness of the charge, because the Courts would not, in my opinion, enforce any claim of a railway company for charges in excess of the maxima which by the statute they were entitled to demand.

For these reasons I am of opinion that although the conduct of the defendants was such that, if they had been dealing with a party under no statutory restrictions as to the amount of his charges, the Court ought to have inferred the existence of a contract to pay the sum demanded, yet, in view of the statutory restrictions to which I have referred, the defendants were entitled to have the reasonableness of the charge pronounced upon by the jury, and that this appeal ought to be allowed and the case go back for trial.

BUCKLEY L.J. I agree, and I cannot usefully add anything.

Appeal allowed.

Solicitors: *L. H. Falck; Beale & Co.*

H. B. H.

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1908
March 27
April 1.

[IN THE COURT OF APPEAL.]

THE KING *v.* LOCAL GOVERNMENT BOARD. *Ex parte* SOUTH STONEHAM UNION.

Local Government—Poor Law—Dissolution of Union—Uniting of Parishes—Consent of Guardians—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict.* c. 61), *s.* 11—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict.* c. 101), *s.* 64.

The Divided Parishes and Poor Law Amendment Act, 1876, s. 11, empowers the Local Government Board to dissolve "any union, whether formed under the Poor Law Amendment Act, 1834, or otherwise":—

Held by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that the section applied to a union formed under a local Act which created for ever a corporation of guardians (which the Local Government Board had no power to dissolve) with authority to rate within the district in an exceptional manner.

The Poor Law Amendment Act, 1844, s. 64, provides that it shall not be lawful for the Poor Law Commissioners (now represented by the Local Government Board) to unite to another parish for poor law purposes a parish of more than 20,000 persons where the relief of the poor has hitherto been administered in that parish by guardians appointed under a local Act, and not by overseers of the poor, unless they obtain the consent in writing of two-thirds at least of such guardians:—

Held, that this section was not confined to a parish having its own board of guardians, but applied to a parish forming part of a union.

Appeal from an order of the Divisional Court discharging a rule nisi calling on the Local Government Board to shew cause why an order made by them on January 24, 1908, should not be quashed.

The order of the Local Government Board, after reciting s. 11 of the Divided Parishes and Poor Law Amendment Act, 1876, and reciting that by a local Act (13 Geo. 3, c. l.), intituled "An Act for better regulating the poor and repairing the highways within the town and county of the town of Southampton," it was enacted that the several parishes within the town and county of Southampton and the liberties thereof should be united into one district, hereinafter referred to as "the local Act union," for the purpose of maintaining, relieving, and employing the poor of the said several parishes, and reciting also that the

county borough of Southampton comprised the several parishes of All Saints, Holy Rhood, St. John, St. Lawrence, St. Mary, and St. Michael, which were included in the local Act union, and also the parishes of Portswood and Shirley, which were included in the South Stoneham Union, and that it appeared to the Local Government Board to be expedient that the local Act union should be dissolved, and that the parishes comprised in that union, together with the parishes of Portswood and Shirley, should be united for the administration of the laws for the relief of the poor, provided (art. 1) that from and after March 25, 1908, (1.) the local Act union should be dissolved; (2.) the parishes of Portswood and Shirley should be separated from the South Stoneham Union; (3.) the said several parishes of All Saints, Holy Rhood, Portswood, St. John, St. Lawrence, St. Mary, St. Michael, and Shirley should be united for the administration of the laws for the relief of the poor and should form a union to be termed the Southampton Union.

The parish of St. Mary at the last census contained more than 20,000 inhabitants.

The local Act, 13 Geo. 3, c. l., which was passed in 1773, after creating the union above mentioned, incorporated a body of guardians to continue for ever, to whom the care and management of the poor of the several parishes forming the union should be committed, and prescribed the manner in which the guardians should be elected. It also empowered the corporation of guardians to purchase and receive estates, vested in them a building, known as St. John's Hospital, for a workhouse, and authorized them to levy rates in a special manner as therein provided, and it contained exceptional provisions as to the persons rateable thereunder.

Sect. 11 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), provided as follows: "If it shall appear to the Local Government Board that it is expedient for rectifying the areas of management or otherwise for the better administration of the relief of the poor that any union, whether formed under the Poor Law Amendment Act, 1834, or otherwise, should be dissolved, the said board may, after inquiry held in some one of the unions to be affected, after public notice, so that

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all persons interested in the same may attend and be heard thereat, issue their order for the dissolution of any such union, and such dissolution shall have the same effect and be attended by the same consequences as in the case of a union dissolved under the provisions of the said Act of 1834."

Sect. 64 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), after prescribing the manner in which guardians under local Acts should conduct their proceedings, continued as follows: "Provided always, that when the relief of the poor has been hitherto administered in any parish by guardians appointed under a local Act, and not by overseers of the poor, if such parish, according to the last enumeration of the population published by authority of Parliament, contain more than twenty thousand persons, it shall not be lawful for the said commissioners," (now the Local Government Board) "after the passing of this Act, without the consent in writing of two-thirds at least of such guardians, to declare such parish to be united with any other parish for the administration of the laws for the relief of the poor . . . ."

The guardians of the poor of South Stoneham Union applied for a writ of certiorari to quash this order. The principal grounds of the application were (1.) that the Local Government Board had no power to dissolve the local Act union under s. 11 of the Act of 1876; (2.) that with respect to the parish of St. Mary they had not obtained the consent of two-thirds of the guardians as required by s. 64 of the Act of 1844 to the uniting of that parish with the other parishes. A third ground was based upon the construction of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), and had reference to the separation of the two parishes of Portswood and Shirley from South Stoneham Union and the joining of them to the new union, but this ground was not insisted upon before the Court of Appeal. The applicants having obtained a rule nisi, the rule was discharged by the Divisional Court (Lawrance, Darling, and Walton JJ.).

The Court held (1.) that the Local Government Board under s. 11 of the Act of 1876 had power to dissolve any union, whether formed under a general or a local Act; (2.) that under the Act of 1834 they had power to separate the two parishes

from the South Stoneham Union and add them to the new union; (3.) that the consent of the guardians was not required, inasmuch as s. 64 of the Act of 1844 applied only to a case where the guardians were appointed for a single parish, and not to a case where they were guardians of a union of which the parish formed part. They therefore held that the order of the Local Government Board was valid.

The applicants appealed.

Avory, K.C., S. H. Emanuel, and *R. S. Clease,* for the applicants. First, s. 11 of the Act of 1876 does not by virtue of the words "whether formed under the Poor Law Amendment Act, 1834, or otherwise" empower the Local Government Board to make an order which impliedly repeals the local Act of 1773. It is an established principle of construction that a general Act does not by general words repeal by implication a particular local Act if the words are capable of a reasonable interpretation without involving that repeal: *Thorpe* v. *Adams.* (1) Here the words "or otherwise" can be satisfied by making the section applicable to unions formed under Gilbert's Act (22 Geo. 3, c. 83), which is a general Act, without extending it to unions formed under a local Act. Moreover, s. 2 of the Poor Law Amendment Act, 1867, makes special provision for this very case and prescribes the course to be pursued by the Local Government Board where it is desired to repeal or alter a local Act. This is an attempt on the part of the Local Government Board to do under the Act of 1876 what they ought to have done under the Act of 1867, and this is the first time the attempt has ever been made. Further, there are special reasons why the Act of 1876 should not apply to unions formed under this particular local Act, for the Act incorporates a body of guardians to continue for ever and gives them special powers of rating, and it is anomalous that the Local Government Board, who have admittedly no power to dissolve the guardians, should nevertheless have power to dissolve the union. [Upon this point they also referred to *Rex* v. *St. Pancras* (2) and *Rex* v. *Whitechapel.* (3)]

(1) (1871) L. R. 6 C. P. 125, 135. (2) (1837) 6 A. & E. 1.
(3) (1837) 6 A. & E. 34.

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Secondly, under s. 64 of the Poor Law Amendment Act, 1844, the parish of St. Mary, which has a population of over 20,000 inhabitants and is a parish in which the relief of the poor has hitherto been administered by guardians appointed under a local Act, cannot be united with any other parishes without the consent of at least two-thirds of the guardians, which admittedly has not been obtained. The words of this section are large enough to include every parish in which the relief of the poor is administered by guardians appointed under a local Act, although those guardians act for other parishes also, and there is no reason for limiting the section to a parish having a separate board of guardians of its own. The order of the Local Government Board is therefore ultra vires.

The Solicitor-General (Sir Samuel Evans, K.C.) and *Rowlatt*, for the respondents. First, the words "or otherwise" in s. 11 of the Act of 1876 are wide enough to include every kind of union, whether formed under a general or a local Act. The interpretation clause (s. 44) imports the definitions of the Act of 1834 by reference, and the definition of the word "union" in the Act of 1834 includes unions formed under any local Act. It is said that a provision empowering the Local Government Board to dissolve any union, whether formed under the Act of 1834 or otherwise, must be limited to unions formed under the Act of 1834 or Gilbert's Act and not otherwise. There is no ground for cutting down the plain words of the statute. The fact of the continued existence of the board of guardians after the dissolution of the union creates no difficulty, and such a state of things has been provided for by the Legislature: Dissolved Boards of Management and Guardians Act, 1870; *Morton* v. *Bank of England* (1); Poor Law Authorities (Transfer of Property) Act, 1904. Secondly, s. 64 of the Act of 1844 deals only with the case of a parish having its own board of guardians, and has no application to the guardians of a union.

Avory, K.C., replied.

Cur. adv. vult.

April 1. COZENS-HARDY M.R. This appeal raises several important and difficult questions as to the meaning and effect of

(1) [1904] 1 Ch. 664.

certain sections in the various Poor Law Acts from 1834 to 1876. In form, it is an application to make absolute a rule nisi for a writ of certiorari to remove into the King's Bench Division an order made by the Local Government Board by which a local Act union was dissolved and the parishes comprising that union with two additional parishes were formed into a new union. The material facts may be shortly stated. In 1773 a local Act was passed the title of which was "An Act for better regulating the poor and repairing the highways within the town and county of the town of Southampton." By s. 1 the several parishes within the said town and county were united into one district for the purpose of maintaining, relieving, and employing the poor of the said several parishes, and a corporation of guardians was constituted to continue for ever within the said district, to whom the care and management of the poor of the several parishes was committed. By s. 3 provision was made for the election of guardians in each parish. By s. 8 St. John's Hospital was vested in the corporation of guardians thereby constituted, to be used as a workhouse. By s. 18 the guardians had power to borrow on security of the rates which by s. 21 they were empowered to levy upon the whole district, and not upon the separate parishes. By ss. 25 and 26 certain provisions were made as to rating, differing from the general common law provisions. The general Poor Law Act of 1834 in many sections shews that Parliament contemplated at least three kinds of unions, namely, (1.) unions formed under the Act of 1834; (2.) unions formed under Gilbert's Act (22 Geo. 3, c. 83); and (3.) unions formed under local Acts: see ss. 29, 42, and 109, containing a definition of "union." By s. 32 the Commissioners, now represented by the Local Government Board, are empowered to declare "any union, whether formed before or after the passing of this Act (except when united for the purposes of settlement or rating), to be dissolved or any parish or parishes to be separated from or added to any such union." In my opinion the local Act union falls within the exception, and this section cannot be relied upon by the Local Government Board. The Act of 1834 left it very doubtful what would happen to the property of a dissolved union. The doubt was at least partly

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removed by s. 3 of the Act of 1835 (5 & 6 Will. 4, c. 69), which authorized the guardians or trustees of any dissolved union to sell and dispose of the property which did belong to the dissolved union, and to apply the proceeds of sale for the advantage of the dissolved union as the Poor Law Commissioners might approve. By s. 7 of that Act guardians of every union formed under the Act of 1834 were incorporated. It is therefore apparent that the power to dissolve a union existed notwithstanding that no power was given to dissolve the corporation of the guardians of the dissolved union, unless indeed such power could be held to be implied. In 1870 there was further legislation on the consequences of dissolution, but it does not appear necessary to consider it in detail. In 1844 an amendment Act was passed. It contains clauses for the protection of some parishes containing more than 20,000 inhabitants. In the middle of s. 64 is found a proviso which seems to have no relation to the earlier part of the section. It must, I think, be regarded as a separate and independent enactment. [The Master of the Rolls read the proviso, and continued :—] It is admitted that St. Mary's, one of the parishes affected by the order of the Local Government Board, has more than 20,000 inhabitants, and that no consent has been given by two-thirds of the guardians of the local Act union. It is argued on the part of the appellants that even if, under the powers conferred by the Act of 1876 hereafter referred to, it is competent to the Local Government Board to dissolve the local Act union, which is denied, s. 64 prevents the Local Government Board from uniting St. Mary's with the other parishes, and that on this ground the order is bad. On the other hand it is contended by the Solicitor-General and Mr. Rowlatt that the section applies only to a parish having its own board of guardians, and not to a parish forming part of a union. I have felt considerable difficulty in satisfying myself as to the meaning of the section, but I have come to the conclusion that the construction adopted by the appellants is correct. By whom has the relief of the poor in St. Mary's been administered? Certainly not by overseers, but by guardians appointed under the local Act of 1773. I am not prepared to insert after guardians the words " of that parish " so as to limit the section to the case

of an autonomous parish. The guardians of the union administer the relief of the poor in the parish, and I see no impropriety in allowing the guardians of the union to have a voice when it is proposed to add such an important parish in their district to another parish or parishes. The words of s. 64 exactly describe the circumstances of the present case, although the Legislature probably never contemplated such a state of things. It remains to consider the Act of 1876, for it is under the powers conferred by s. 11 of that Act that the order purports to be made. [The Master of the Rolls read s. 11, and continued:—] Sect. 11 must be read with s. 44, which in effect incorporates the definition of "union" found in s. 109 of the Act of 1834. The question is whether the words of s. 11, the generality of which is manifest, can be cut down so as to make the section apply only to unions formed under the Act of 1834 or under Gilbert's Act. It is true that a public Act is not presumed to affect prior local Acts, and that, if there is room for doubt, the public Act ought to be so construed as not to affect them. I do not feel able to limit the words in the present case. The Act of 1876 is one of a series of Acts which beyond all doubt in many ways deal with unions formed under local Acts, and there is nothing improbable in such unions being within the operation of s. 11. The words "whether formed under the Act of 1834 or otherwise" are not restrictive of the meaning attached to the word "union" standing alone, but are really emphatic to make it clear that the section does not refer only to unions formed under the Act of 1834. I am fully alive to the strange consequences which thus follow from the act of a Government department. The corporation created by the Act of 1773 is not dissolved, but the whole principles of rating which have been in force for 135 years are altered by a stroke of the pen to the grievous prejudice, it may be, of many of the ratepayers of the district. But I cannot escape from the language used in s. 11. Nor can I see any sufficient reason for holding that the section applies to some only of the unions formed under local Acts, according as the provisions of those local Acts are more or less analogous to the provisions of the general law. The result is that, in my opinion, although it is competent to the Local Government Board to dissolve the

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union formed by the local Act of 1773, it is not competent to the Local Government Board to deal with the parish of St. Mary's as it is dealt with in the order. I therefore think that the order of the Divisional Court discharging the rule nisi was wrong, and that the appeal must be allowed and the rule for a certiorari be made absolute.

FLETCHER MOULTON L.J. I am of the same opinion. The special Act on which the questions in this case principally turn was passed in 1773. The period covered by the legislation which bears on the questions at issue covers, therefore, all the stages of the modern legislation with regard to the relief of the poor, and it will be necessary to examine the growth of that legislation in order fully to understand its scope and effect.

The administration of the poor law commenced in the reign of Elizabeth by being placed in the hands of the parishes. Apparently public opinion at first tended towards the view that this was an inconveniently large unit, and for a time it was a frequent custom to divide up the parishes for dealing with the relief of the poor. But the contrary current set in, and may be said to have continued to the present time. Larger units were found more convenient, especially when the practice of building poor-houses became more common, and the grouping of parishes into unions has been authorized by the Legislature in a very large number of cases. At first this was done by local Acts dealing with individual cases, of which the Act in the present case is a specimen. But in 1782 a general Act, known as Gilbert's Act, was passed, authorizing parishes to unite for poor law purposes by the machinery provided in it, and many unions were constituted in this way. Then came the Poor Law Amendment Act of 1834, which established the Poor Law Commissioners, who are now represented by the Local Government Board, and gave to them very wide powers for regulating the poor law administration throughout England, both where unions existed and where the relief was still dealt with parochially. It is clear that in framing this general Act the Legislature was careful to bring within its scope all unions then existing or to be formed under that Act. In s. 109, which is the interpretation clause, it

is provided: "The word 'union' shall be construed to include any number of parishes united for any purpose whatever under the provisions of this Act, or incorporated under the said Act made and passed in the twenty-second year of his late Majesty King George the Third, intituled, 'An Act for the better relief and employment of the Poor,' or incorporated for the relief or maintenance of the poor under any local Act." Powers were given by s. 32 to the Commissioners to dissolve unions or to separate from them or add to them any parish or parishes. But those powers did not apply to all unions, inasmuch as those that were united for the purposes of settlement or rating were excepted from the provisions of the section. Nor were the powers of the Commissioners absolute. A majority of not less than two-thirds of the guardians of the union affected must concur in the proposed change.

By the Poor Law Amendment Act, 1844, the Legislature gave still wider powers to the Commissioners by enacting that their jurisdiction to separate or add parishes from or to a union formed under the Act of 1834 should be exercisable in certain cases without obtaining the concurrence of the guardians. But by a proviso, which appears by mistake to have got into s. 64 of the Act, it provided that when the relief of the poor had been administered in any parish by guardians appointed by a local Act, and not by overseers of the poor, and such parish contained a population above 20,000, it should not be united with any other parish without the consent in writing of two-thirds of the guardians. In 1867 the Legislature took a further step. By the Poor Law Amendment Act of that year it gave to the Poor Law Board the power, on the application of the guardians of any union or parish where the administration of the poor law was subject to the control or regulation of a local Act, to issue a provisional order to repeal or alter such local Act. Such provisional order was not to have validity until confirmed by Parliament in the usual way. This state of things lasted until the passing of the Divided Parishes and Poor Law Amendment Act, 1876. By s. 11 of that Act power was given to the Local Government Board to dissolve "any union, whether formed under the Poor Law Amendment Act, 1834, or otherwise," after

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proper public inquiry had been held. It is under the powers of this section that the Local Government Board purport to act in issuing the order in this case, and the question before us is whether or not the order is within its powers.

The first question for our decision is whether the Local Government Board have the power by order to dissolve the union in question. Sect. 44 of the Act of 1876 provides that the words contained in that Act shall be construed as in the Poor Law Amendment Act, 1834. The word "union" therefore includes unions formed under the Act of 1834, or incorporated under Gilbert's Act, or incorporated for the relief or maintenance of the poor under any local Act, and the appellants admit that the union to which the present case refers comes within that definition. That being so, I can feel no doubt that it comes within the provisions of s. 11 of the Act of 1876, which are expressly made to apply to "any union whether formed under the Poor Law Amendment Act, 1834, or otherwise." The words are as wide as possible and are clearly intended to include all unions however formed. One has only to bear in mind the definition of the word "union" to see that the "otherwise" must refer to those that were incorporated under Gilbert's Act and those which were incorporated under local Acts. I am therefore of opinion that this union comes within the provisions of s. 11.

It was strenuously argued that the local Act in this case not only created a union, but also created a corporation for the management of that union, namely, "the guardians of the poor within the town and county of the town of Southampton," and gave them special powers and functions with regard to rating, &c., and that therefore the general Act must be construed so as not to affect this special local Act. I am unable to follow this reasoning. The plan of creating a corporation for poor law purposes within a union is no peculiarity of this special Act. All unions formed under Gilbert's Act were administered by similar corporations, and no doubt this was the ordinary machinery of such special Acts, inasmuch as we find in the definition of union in the Poor Law Amendment Act, 1834, a reference to unions "incorporated" under Gilbert's Act and "incorporated" under local Acts. The

Legislature, therefore, must be taken to have contemplated in giving to the Local Government Board the powers of s. 11 of the Act of 1876 that the unions so dissolved would in many, if not in all, cases be unions that were administered by a corporation created ad hoc. It is not necessary for us to decide what the effect on the corporate body of the dissolution of the union would be. It is sufficient for the purposes of this case that the Legislature clearly provides the power of dissolving the union. Still less do I think it legitimate to examine a special Act and to consider whether or not difficulties will arise in it through the dissolution of the union which it creates. If the Legislature has provided that the Local Government Board shall have the power of dissolving unions formed under local Acts without qualification or limitation as to what the nature of those local Acts should be, it is not for the Court to pick and choose among such Acts in applying such provisions. It suffices that the Act incorporates a union to bring it under the provisions of s. 11 so far as the power of dissolution of that union is concerned. The Legislature has chosen to deal with these Acts as a class, and even if the Court were of opinion that it would have been prudent or advisable to except any member of that class, or that complications will arise from a particular member of the class being included, its duty is only to give effect to the provisions of the Legislature over the whole class.

I am therefore of opinion that the Local Government Board have the power by order to dissolve this union, and that therefore the first of the three directions in the order is intra vires.

The appellants gave up their contention that the second portion of the order was ultra vires, but they contended strongly that the Local Government Board had not the power to form a union of the parishes named under art. 1 (3.) by reason of the fact that the parish of St. Mary contains more than 20,000 inhabitants. They say, therefore, that it comes within the provisions of s. 64 of the Act of 1844, inasmuch as the relief at that date was administered in that parish by guardians appointed under a local Act and not by overseers. This raises a very difficult question, the difficulty of which is partly due to the fact that the latter part

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of s. 64 is obviously misplaced in the Act, and it is difficult to determine with any certainty where it should properly be placed so as to ascertain the context with which it is to be read and interpreted. Forming the best opinion I can, I think that it was intended to be the concluding part of s. 66, and that it was meant to extend to large single parishes possessing guardians the same protection that was given to unions by the last paragraph of s. 32 of the Act of 1834. Sect. 66 of the Act of 1844 deals with the powers of the Commissioners to dispense with the concurrence of the guardians in the case of a union formed under the provisions of the Act of 1834, but it leaves untouched the case of unions formed under a local Act. The proviso in s. 64 partly deals with this omitted case. It provides that it shall not be lawful for the Commissioners to unite to another parish for poor law purposes a parish of more than 20,000 persons when the relief of the poor has hitherto been administered in that parish by guardians appointed under a local Act unless they obtain the consent in writing of two-thirds of such guardians. The respondents contend that this applies only to such parishes as have guardians of their own to administer the relief of the poor in that parish under a local Act, and not to parishes where the relief of the poor is administered by guardians appointed by a local Act applying to a union of which that parish is only a part. The appellants on the other hand contend that the words are quite general and that they apply to the present case.

There can be no doubt that the language of the proviso, taken in its strict and literal sense, applies in every particular to the present case. The relief of the poor in the parish of St. Mary is now and was in 1844 administered by guardians and not overseers, and the consent of two-thirds of those guardians to the proposed uniting of that parish to any other parish has not been obtained. In the case of a proviso which may be said to stand without context or any like indication of its purpose or the part it is to take in the scheme of legislation, I do not feel justified in doing otherwise than abide by the strict and literal meaning of the words, and therefore must assent to the contention of the appellants. At the same time I must add that on close examination of the proviso there is much to indicate that

it was meant to apply to parishes only and not to unions. It is clear that at the moment at which it is to take effect the parishes must not be members of any union, because, if they were, it would not be a case of adding one parish to another, but of adding it to the union of which the other was a part, a thing which would not fit the language of the proviso. I think, therefore, the Legislature were contemplating only the case of parishes with their own guardians when the proviso was framed, but the language used fits a case like the present, where it is sought uno ictu to dissolve a union and to make new combinations of its parishes, one of which is a large one, and we cannot, in my opinion, cut down the application of the proviso because there may be evidence of a legislative oversight. I am therefore of opinion that this appeal must be allowed.

BUCKLEY L.J. When the question to be resolved turns upon the construction, that is to say the true meaning, of Acts of Parliament so expressed as those upon which the question here arises, it is impossible to feel any satisfaction in the conclusion to which the mind is ultimately brought. But I have arrived at the conclusion that the appellants are right, and I have only, as shortly as may be, to state my reasons. The local Act of 1773 united certain parishes for ever into one district for the purpose of maintaining the poor, and, secondly, incorporated a body of guardians, to continue for ever, to whom the care and management of the poor in the several parishes should be committed. It gave that corporation of guardians power to purchase and hold lands, enabled persons to convey to the corporation, vested St. John's Hospital in the corporation (s. 8), and empowered the corporation to make rates in the particular manner specified in s. 21. It further provided by s. 25 that certain persons who would not otherwise have been should be deemed to be occupiers so as to be rateable. In brief, the local Act did two things. It united for ever certain parishes into one district and created for ever a corporation which was to hold land and was to rate within the district in a certain exceptional manner.

First, then, as to s. 11 of the Act of 1876. That Act by s. 44 introduced the definition clause, s. 109, of the Act of 1834, and thus

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defined the word "union" to include parishes united under the Act of 1834, parishes incorporated under the Act 22 Geo. 3, c. 83 (Gilbert's Act), and parishes incorporated for the relief of the poor under any local Act. Sect. 11 relates to any union (which by the definition will include a union of any of those three classes) "whether formed under the Act of 1834 or otherwise." Prima facie it seems to me impossible to dispute that the words "or otherwise" include unions formed, or, as the Act of 1834 calls it, "incorporated," under a local Act. The question, however, is whether s. 11 includes such a union as that formed under this particular local Act. A first material circumstance is that, if the union formed under this local Act is included and can by the Local Government Board be dissolved, the union will disappear, but the corporation of guardians constituted by the Act of 1773 will continue. I find, however, that in Gilbert's Act (s. 21) unions formed under that Act were in like manner provided with incorporated bodies of visitors and guardians. Mr. Avory does not dispute that the words "or otherwise" must sweep in unions formed under Gilbert's Act, so that the difficulty as regards the incorporated guardians is one which is equally applicable both to the unions under Gilbert's Act and the union under this local Act. But as regards this particular local Act the matter does not stop there. Sects. 21 and 25 of this local Act contain particular provisions as to rating which must necessarily cease if the order of the Local Government Board be good. In the substituted union the rights of rating will be different. If, therefore, this union be within the power of dissolution in s. 11 of the Act of 1876, it follows that the power residing in a department of the Government to dissolve the union will necessarily have the effect of repealing those clauses of the Act of 1773 which provided for a particular incidence of the rates.

The question here to be asked, I think, is this: Are the earlier particular Act (that of 1773) and the subsequent general Act (that of 1876) so expressed as that upon the true construction of both the conclusion is reached that the latter repeals or gives the Local Government Board power to repeal the former, or any part of the former except to the extent that a dissolution repeals it? The following are Lord Selborne's words in *Seward* v.

Vera Cruz (1): "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." The following are the words of Page Wood V.-C. in *Fitzgerald* v. *Champneys* (2): "In passing the special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated." In my opinion the language of the Act of 1876 is not such as to admit of the conclusion that it was intended that the Local Government Board should have power to dissolve such a union as was constituted by the Act of 1773. The dissolution of this union would result in the repeal of some part of the Act of 1773 other than that which formed the union. Such repeal must, I think, be made by Parliament or as provided by the Act of 1867, and is not within the Act of 1876.

Next as to s. 64 of the Act of 1844. The proviso in this section is no qualification of anything which precedes. It is obviously misplaced. If I were to guess I should suppose that, while intended to form part of s. 65, or more likely of s. 66, it has by a blunder been put into s. 64. However, there it is. The question upon it is whether a parish of the requisite size which for purposes of poor law administration does not stand alone, but is included in a union, is within the proviso. In my opinion it is. The respondents' argument was continually making use of words which are not contained in the proviso, namely, guardians of the parish or guardians appointed for the parish. That is not the language of the section. The parish spoken of must satisfy two requisites—first, it must contain more than 20,000

(1) (1884) 10 App. Cas. 59, at p. 68. (2) (1861) 2 J. & H. 31, at p. 54.

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persons; secondly, it must be a parish in which the relief of the poor has been administered by guardians appointed under a local Act. Both those qualifications are satisfied by St. Mary's parish. The existence of guardians of the parish as distinguished from guardians of the union was insisted upon as contemplated by those words which provide for the consent in writing of two-thirds of the guardians. I do not think those words lead to any such conclusion. Whether they were guardians of the union or guardians of the parish, the Legislature may equally well have thought that in the case of a large parish in which the relief of the poor was administered not by overseers, but by guardians under a local Act, their consent ought to be required. The point as regards the guardians is not that they should be guardians of the parish as distinguished from guardians of the union, but that the case should be one in which the relief of the poor is administered by guardians under a local Act as distinguished from overseers of the poor.

For these reasons the appellants, I think, are right both as to the first and as to the third point. The second they declined to argue. Being of this opinion, it results that in my judgment the appeal must be allowed and the rule made absolute.

Appeal allowed.

Solicitors: *Lees, Butterworth & McDonnell, for Westlake, Southampton; Sharpe, Pritchard & Co.*

H. B. H.

[IN THE COURT OF APPEAL.]

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TILLMANNS & CO. *v.* SS. KNUTSFORD, LIMITED.

Shipping—Bill of Lading — Construction — Inaccessibility of Port of Discharge on account of Ice—"Unsafe in consequence of War, Disturbance, or any other Cause"—Ejusdem Generis Principle—"Error in Judgment of Master"—Signature of Bill of Lading by Time Charterers on behalf of Shipowners.

Goods were shipped on board a steamship for a foreign port under bills of lading containing the following conditions and exceptions: "(2.) Error in judgment, negligence or default of . . . . master . . . . whether in navigating the ship or otherwise"; "(4.) Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease":—

Held, (1.) that inaccessibility was a question of fact, and that the port must be inaccessible not merely at the moment of the ship's arrival off the port, but also for a reasonable time after her arrival and first attempt to enter; (2.) that the words "or any other cause" must be read as being ejusdem generis with war or disturbance, and that therefore the case was not brought within the exception because the master deemed the port unsafe or inaccessible on account of ice; and (3.) that the expression "error in judgment of the master" did not include a mistake as to the extent of his powers owing to his misconstruction of the bills of lading.

When the bills of lading were signed, the steamship was under a time charter containing the following clause: "(12.) The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo . . . ." One of the bills of lading was not signed by the captain, but by the time charterers "for the captain and owners":—

Held by Farwell and Kennedy L.JJ. (Vaughan Williams L.J.

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doubting), that the signature of the bill of lading by the time charterers bound the shipowners.

Decision of Channell J., [1908] 1 K. B. 185, affirmed.

APPEAL of the defendants from the judgment of Channell J. in an action tried in the Commercial Court without a jury, reported [1908] 1 K. B. 185.

The plaintiffs, a German firm carrying on business at St. Petersburg, were at all material times holders and indorsees of bills of lading signed at Middlesborough in October, 1905, under which a cargo of coke was to be delivered at the port of Vladivostock or so near thereto as the ship might safely get. The bills of lading contained (inter alia) the following conditions and exceptions :—

"2. The act of God . . . . misfeasance . . . . error in judgment, negligence or default of pilot, master, officers, engineers, seamen, firemen, or other persons in the service of the ship, whether in navigating the ship or otherwise; risk of craft or hulk or transhipment; and all and every the dangers and accidents of the land and water, and of navigation of whatsoever nature and kind.

"4. Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease.

"12. The company reserves the right of forwarding the goods to their destination by any other vessel belonging either to this or any other company or individual, subject to all conditions which may be exacted by the companies or individuals who may complete the transit; the risk of transhipment, landing, storing and reshipment to be borne by the shippers, consignees, or owners of the goods, but the expense to be defrayed by the company. This right is not affected by abandonment of the ship by her crew or to the underwriter."

The bills of lading concluded in the following form :—

"In witness whereof the master or agent of the said ship hath

signed bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated at the day of 1905.

"For the Captain and Owners."

At the time the bills of lading were signed the *Knutsford* was under time charter to Watts, Watts & Co., of London. By clause 12 of the charterparty it was provided that "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibility as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual."

The shippers of the goods paid the freight in advance to Watts, Watts & Co. The bills of lading were four in number, three being signed by the captain of the *Knutsford* underneath the printed words "For Captain and Owners," and all dated October 12, 1905, the fourth being signed by Watts, Watts & Co., "For the Captain and Owners," and dated October 26, 1905.

The *Knutsford* having loaded her cargo at Middlesborough and London, sailed from London on October 28, 1905. On February 7, 1906, she arrived at Moji, and there took 400 tons of bunker coal on board. On February 8 she left Moji for Vladivostock with the 1500 tons of cargo and upwards of 400 tons of bunker coal. On the morning of February 12 she arrived off Askold Island, and in company with another steamer, the *Hawk*, tried to get into Vladivostock. There was a strong northerly wind, and the channel was much blocked and impeded by ice. In these circumstances the *Knutsford* failed to make progress, and on February 13 and 14 the same conditions prevailed, and though renewed attempts were made they failed, and on the latter date, after trying for three or four hours to

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break through the ice, the master of the *Knutsford* gave up the attempt.

During these attempts the *Knutsford* was about forty miles from Vladivostock. At about 4 P.M. on February 14 the *Knutsford* left for Nagasaki, leaving the *Hawk* behind. Channell J. did not doubt that the master of the *Knutsford* acted in good faith, and that he had to some extent the safety of the vessel under his consideration, but he (Channell J.) came to the conclusion that the paramount consideration in the master's mind was the delay which further attempts to get into Vladivostock would have caused. At the time he abandoned the attempt he had enough coal on board to have enabled him to wait three or four days longer, and there would have been no real danger in his waiting for that time, and if he had waited he would have been able to get into Vladivostock on February 15. In returning to Nagasaki the master thought he was acting in accordance with clause 4 of the exceptions and conditions contained in the bills of lading. On February 15 the *Hawk* tried again, and succeeded in getting into Vladivostock at 1.30 P.M. Evidence was given to the effect that Vladivostock was open between January 23 and February 28, with vessels going in and out almost daily. On February 17 the *Knutsford* arrived at Nagasaki. On February 24 Watts, Watts & Co. cabled to Dodwell & Co., their agents in Japan, to have the cargo discharged at Nagasaki. John Batt & Co., of London (who had been appointed by the plaintiffs to look after their interests), on being informed of that fact by Watts, Watts & Co., protested on the plaintiffs' behalf against the discharge. On February 26 the *Knutsford* commenced discharging, and on March 5 she finished discharging. On March 6 the *Knutsford* left for Moji. On April 2 the cargo landed ex *Knutsford* was loaded by the plaintiffs' instructions partly on the *Taifuka Maru* and partly on the *Daisan Kotohira Maru*, which arrived at Vladivostock on April 10 and April 15 respectively.

The plaintiffs complained that by reason of the non-delivery of the goods at Vladivostock in accordance with the bills of lading they had suffered loss and incurred expense in respect of the landing and forwarding of the goods from Nagasaki to Vladivostock, and in respect of the consequent delay, deterioration, loss

in weight, and loss of market, and claimed damages in respect thereof. In the alternative they claimed the return of the advance freight paid by them as money had and received, upon a total failure of consideration.

It was arranged between the parties that if the defendants were liable there should be judgment for the plaintiffs for a sum to be agreed, with liberty to apply as to assessment of damages if necessary.

Channell J. gave judgment in favour of the plaintiffs (1), and the defendants appealed.

J. R. Atkin, K.C. (*Lewis Noad* with him), for the defendants. The shipowners are protected from liability by the exceptions and conditions in the bills of lading. First, the port of Vladivostock was "inaccessible on account of ice" within the meaning of clause 4 of the bills of lading. The expression means inaccessible at the time of the arrival of the ship, and possibly for a reasonable time afterwards. Such inaccessibility is in its nature temporary, but may continue for weeks or months. The captain made a series of attempts to enter the port, and it would have been unreasonable to detain the ship any longer after their failure. The finding of Channell J. that the port was not inaccessible was not justified by the evidence and should be reversed.

Secondly, the construction placed by Channell J. on the words "or any other cause" was too narrow; their natural meaning should not be limited by treating them as being ejusdem generis with war and disturbance, the words which immediately precede them. When clause 4 is carefully read it will be seen that the exception applies not only if the port is inaccessible on account of ice, but also if the master deems it unsafe on account of ice; that is to say, "ice" must be read as being within the second limb of the exception as well as the first, and is one of the causes for which the captain may in the exercise of his discretion deem the port to be unsafe. The proper construction of the clause is that the first limb is intended to cover cases where the port is inaccessible in fact and there is no necessity for an exercise of

(1) [1908] 1 K. B. 185.

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discretion by the master, while under the other limb the master has to exercise his discretion as to whether the entry of the port is safe or not. Prima facie, effect should be given to the ordinary meaning of general words which follow an enumeration of particular things, unless the circumstances of the case make it improper to do so: *Anderson* v. *Anderson* (1); there are no such circumstances here, and the reasonable meaning of the clause is that, even if the port is not strictly inaccessible, it may be unsafe by reason of the presence of ice. If the parties had desired to limit the exception to unsafety by reason of war or disturbance, the proper course would have been to omit the words "or any other cause," as was done in *Nobel's Explosives Co.* v. *Jenkins & Co.* (2)

[KENNEDY L.J. referred to *Norman* v. *Binnington*. (3)]

Full effect was given to the words "or otherwise" in *Baerselman* v. *Bailey* (4), where an exception of negligence of the pilot, master, &c., "in navigating the ship or otherwise" was held to cover damage arising from negligent stowage. There is no need to deprive the words "or any other cause" in the present case of their full effect in order to make the contract rational.

Thirdly, the exception in clause 2 of "error of judgment . . . . in navigating the ship or otherwise" includes an error of the captain in misconstruing the bills of lading. *Baerselman* v. *Bailey* (4) is an authority that the clause is not to be limited to errors of judgment in navigation, and an error of judgment arising from a wrong view as to the discretion given to the captain by the bill of lading is within the exception.

Fourthly, the bill of lading signed by the time charterers created no privity of contract between the shipowners and the owners of the goods. A captain binds the shipowner by signing bills of lading on the principle of holding out. In the absence of authority to the charterers to sign they could not bind the shipowners by their signature. The time charterers signed "for captain and owners"; they cannot have had an implied authority to sign for the captain, although the latter was no doubt placed under their directions; and there is no evidence that they had any authority to sign so as to bind the shipowners. [He also

(1) [1895] 1 Q. B. 749.
(2) [1896] 2 Q. B. 326.
(3) (1890) 25 Q. B. D. 475.
(4) [1895] 2 Q. B. 301.

cited *Metcalfe* v. *Britannia Ironworks Co.* (1); Scrutton on Charterparties, 5th ed. pp. 90, 91.]

J. A. Hamilton, K.C. (*Adair Roche* with him), for the plaintiffs. Inaccessibility is a question of fact, and the finding of Channell J. ought not to be disturbed. The port could not, in fact, have been inaccessible, when on the very day after the captain turned back another vessel succeeded in entering. *Metcalfe* v. *Britannia Ironworks Co.* (1) is an authority for the proposition that, where the port of destination is ice-bound, it is the captain's duty, apart from any special contractual obligation, to wait until the channel is clear. From the most favourable point of view for the defendants, "inaccessible" must mean inaccessible for a reasonable time after arrival, not merely at the moment of arrival, off the port, and the measure of a reasonable time must be determined by what a mariner of ordinary prudence and judgment would do in the interests of all parties.

[FARWELL L.J. "Reasonable time" in such a case was dealt with by Lord Blackburn in *Dahl* v. *Nelson*. (2)]

Yes; there must be a reasonable waiting to see if the obstacle will be removed.

Secondly, as to the construction of clause 4 with reference to the suggestion that the exception applied if the captain deemed the port inaccessible on account of ice. It is plain that the first part of the clause deals with two distinct matters—(1.) inaccessibility of the port by reason of ice, blockade, or interdict, which are matters of fact and call for no exercise of discretion by the captain; and (2.) its being deemed unsafe by reason of war, disturbance, or any other cause: this is a matter for the exercise of the captain's discretion. The exception of "ice" is confined to the first part of the clause. The words "or any other cause" should be construed as ejusdem generis with war and disturbance; otherwise they would be equivalent to "any" cause, and no effect would be given to the word "other." *Baerselman* v. *Bailey* (3) is not an authority against the plaintiffs; in that case Lord Esher M.R. says (4): "In the exception we do not find words of a class followed by general words"; but that is precisely

(1) (1877) 2 Q. B. D. 423.
(2) (1881) 6 App. Cas. 38.
(3) [1895] 2 Q. B. 301.
(4) [1895] 2 Q. B. at p. 303.

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what we do find in clause 4 in the present case. The context shews that the words "or any other cause" are not to have the wide meaning contended for; if they have, they would include a cause not similar to war or disturbance, such as fog, &c., and the insertion of the words "war" and "disturbance" would be unnecessary. If the ejusdem generis rule is applied, it is easy to suggest causes ejusdem generis with war and disturbance, such as contact with floating mines not removed after the Russo-Japanese war. In a bill of lading it is a general canon of construction that general words are to be construed as being ejusdem generis with prior particular words: *In re Richardsons and Samuel.* (1) If the clause is to be read as though the word "ice" were repeated after the words "war, disturbance," the defendants must bring themselves strictly within the clause by shewing that the captain deemed entry to the port to be unsafe on account of ice; there is, however, no evidence of the existence of any danger arising from the ice, and it is clear that the captain did not deem it dangerous, but simply inaccessible on account of ice, and that he went away because he thought he had waited long enough. Further, in order to bring the case within the exception relating to the master's deeming the port to be unsafe, it must be the discretion of the master himself which determines where the goods shall be discharged: but the reason why these goods were landed at Nagasaki was because it was so ordered by the time charterers; the master never exercised any discretion in the matter.

Thirdly, error in judgment on the part of the captain means some mistake with regard to an act of seamanship, unfortunate though not negligent. It must be the captain's own error in judgment, and he ceased to exercise an independent judgment at Nagasaki when he wired to England for orders from the time charterers, whose errors of judgment are not the subject of any exception in the bill of lading. The expression does not cover misconstruction by the captain of the bill of lading or misapprehension of the powers conferred on him by that document.

Fourthly, as to the fourth bill of lading. The captain was by the charterparty to be under the orders of the charterers, and it

(1) [1898] 1 Q. B. 261.

is implied in the charterparty that the time charterers can direct the captain to sign bills of lading or can sign themselves for the captain and owners. The signature of the bill was either authorized at the time or ratified afterwards, for the time charterers signed for the master and owners, and the owners made no objection.

J. R. Atkin, K.C., in reply.

Cur. adv. vult.

Feb. 26. VAUGHAN WILLIAMS L.J. The main question in this appeal relates to the construction of a passage in paragraph 4 of the bill of lading: "Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place at the risk and expense of the shippers, consignees or owners of the goods, and upon such discharge the ship's responsibility shall cease." There is a further point which affects one only of the four bills of lading with which the action is concerned, which is dealt with by Channell J. in his judgment in the following terms: "I will deal with the simpler points first. With regard to the effect of the signature of the fourth bill of lading by Watts, Watts & Co. in their own name, if the captain had signed that bill of lading by the direction of Watts, Watts & Co., which he would have been bound to do by the charterparty, he would, in my opinion, have bound the owners, notwithstanding that the real contracting party was the time charterer. Three bills of lading were so signed. They are all in one form, and are for the captain and owners even although they are signed by the hand of the captain and with his name. With regard to the fourth, Watts, Watts & Co., the time charterers, instead of directing, as they were entitled to do, the captain to sign, signed it themselves. I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it. If they had struck out the words 'for the captain and owners,' and then

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signed it, I think they would, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They purported to sign it for the captain and owners, and, therefore, to make it the contract of the captain and owners, and they had absolute power to do that by the terms of the charterparty. Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but for the reasons I have given I am of opinion that the fourth bill of lading is exactly on the same footing as the other three." The view taken by Channell J. makes it necessary for me now to read clause 12 of the charterparty. [His Lordship read the clause as already set out.]

I must confess that I have felt very considerable difficulty about this small point, which only applies to one of these bills of lading. I do not quite understand the meaning of the passage in the judgment of Channell J. where he says: "Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but for the reasons I have given I am of opinion that the fourth bill of lading is exactly on the same footing as the other three." I do not desire to differ from the view taken by my brother Channell, but on comparing the language of his judgment with clause 12 of the charterparty I feel the recurrence of a difficulty that suggested itself to me at first. The shipowners say that they will accept certain liabilities if certain antecedent conditions are performed, one of which is the signing of the bills of lading by the captain; the language of the charterparty is, "The charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents." It seems to me that the due performance of these conditions is essential here. Channell J. says: "I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it." Had I been sitting alone I should not have come to the same conclusion as the learned judge; but, as I understand that my brethren are

prepared to affirm the judgment of Channell J. in this respect, I may content myself with expressing a very grave doubt as to the meaning of that sentence.

I now come to the question of the construction of clause 4 of the charterparty. This clause deals with two possible events, on the happening of either of which it is competent for the master to discharge goods intended for Vladivostock either upon the ice or at some other safe port or place at the risk and expense of the shippers, consignees or owners of the goods, and upon such discharge the shipowners' responsibility is to cease. As I read this clause, the earlier words deal with inaccessibility, whether arising from a physical cause, like the presence of ice which renders the port inaccessible, or from the acts or orders of persons competent to do such acts or to give such orders; that is the case of a blockade or interdict. Then comes the second condition, "or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause." On one side it is said that we are to read the words "or any other cause" according to their wide general meaning; the other side ask us to read them as limited by the antecedent setting out of the particular instances, "war or disturbance," and contend that "any other cause" can only mean a cause ejusdem generis with war or disturbance. I do not wish to lay down any general rule, or any rule beyond that which is necessary for the decision of the present case. When I come to deal with the genus which is suggested by the words "war" and "disturbance," I think that, according to the general rules that have been laid down, we should find some common bond between the words "war" and "disturbance"; if a common genus is not to be found the necessary consequence would be that the words "or any other cause" could not be limited by the doctrine of ejusdem generis. The question is what that genus should be. Of course, there may be a fairly wide definition of the genus if it is defined as comprising cases which present such features that the master may deem the port unsafe in consequence of actions of others making it physically unsafe to enter or discharge, whether arising in respect of war or in respect of civil disturbance; that is what I understand to have

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been suggested on behalf of the plaintiffs. On the other hand, it is suggested that the genus may be wider still, that it covers everything which could reasonably be considered as a cause of insecurity or presence of danger in the case of entry at the port of discharge. The objection to the latter is that in such a case the words "or any other cause" do not appear to be wanted.

I come now to the main point argued, which was that the ejusdem generis rule does not apply at all. It was contended for the defendants that the right rule is that to the words which follow the enunciation of a series of particular words their natural wide meaning should prima facie be given, unless upon the face of them there is something to shew that they should bear a narrower construction limited by the particular words which have been enunciated before. That contention was based upon *Anderson* v. *Anderson* (1), which was the case of a post-nuptial settlement made by a husband upon his wife, under which he demised to trustees a leasehold messuage and premises described in a schedule and assigned to them "all the household furniture, plate, linen, china, glass and tenant's fixtures, wines, spirits, and other consumable stores and other goods, chattels and effects in or upon or belonging to the said leasehold messuage"; in the schedule the leasehold premises were described as "a piece or parcel of ground, with the messuage, tenement, or dwelling-house, back building, coach-houses, stable buildings, and all other erections thereupon." It was held that under the general words "other goods, chattels and effects" there passed to the trustees the carriages, horses, harness, and stable furniture in or upon the coach-house and stables. I will read two passages from the judgment of Lord Esher. First he says (2): "I will take first the rule as stated by Lord Eldon in *Church* v. *Mundy*. (3) He said: 'the best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.'" Lord Esher is there citing Lord Eldon's words; then, after quoting some words of Knight Bruce V.-C. in *Parker* v. *Marchant* (4), and speaking for himself, he says: "Nothing can well be plainer than

(1) [1895] 1 Q. B. 749.
(2) [1895] 1 Q. B. at p. 753.
(3) (1808) 15 Ves. 396, at p. 406.
(4) (1842) 1 Y. & C. Ch. 290.

that to shew that prima facie general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before." Then Rigby L.J. says (1): "I construe this document in the same way. The doctrine known as that of ejusdem generis has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied; it has been one doctrine throughout. The main principle upon which you must proceed is, to give to all the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to shew that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough." Then he cites *Parker* v. *Marchant*. (2)

Speaking for myself, I can only say that I think the language of those judgments does to some extent support the argument of the defendants. The view which was taken by Lord Esher, Lopes L.J., and Rigby L.J. is not one which has only been taken in that particular case; the judgment of Fry L.J. in *Jersey* v. *Neath Guardians* (3) is to the same effect. In construing a reservation in a conveyance in fee of "all mines of coal, culm and iron and all other mines and minerals whatsoever except stone quarries," he said: "I think that the words 'all other mines and minerals whatsoever' are intended to mean that which they express, and where you find the word 'whatsoever' following, as it does upon certain substantives, it is often intended to repel, and

(1) [1895] 1 Q. B. at p. 755. (2) 1 Y. & C. Ch. 290.
(3) (1889) 22 Q. B. D. 555

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in this case does effectually repel, the implication of the so-called doctrine of ejusdem generis, which, I think, has often been urged for the sake of giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have." That is really the suggestion that was made by Mr. Atkin in his argument. Speaking of the history of a clause of this nature in a bill of lading, he contended that the words "or any other cause," which used not to appear in the common clauses of a bill of lading, were of modern introduction and were introduced in this particular case because the parties wished that this exception should be wider than the ordinary clause would previously have been, that it should not be limited to the particular insecurity caused by war or to the particular insecurity caused by civil disturbance, and that the words were inserted for the express purpose of repelling the limitation of the exception to war and disturbance and things akin or like to war or disturbance, thus making the clause apply to every cause of insecurity in the entry and discharge at a port. To enforce his argument he also read some passages from Scrutton on Charterparties, which give a similar history of the growth of this clause; but he tendered no evidence on the point at the trial, and as far as I can ascertain no expert in such matters was called to shew how the clause acquired its present shape. It was upon a somewhat similar ground that Lord Ellenborough acted in *Cullen* v. *Butler* (1), where he pointed out that the Court could not accept one of the arguments laid before them because of the history of the clause, which shewed that underwriters and shipowners had long accepted the clause as having a particular meaning.

I have consulted other cases, which I need not cite, and which shew that the strict application of the ejusdem generis rule as limiting the general words to something akin to the antecedent enunciation of particular words has been much less frequent of late years. The real contest comes in here. In *Anderson* v. *Anderson* (2) there can be no doubt as to what was laid down by the Court of Appeal, and in the absence of a conflicting decision of equal authority we are bound by that case unless the facts are different. It was there undoubtedly held that the

(1) (1816) 5 M. & S. 461. (2) [1895] 1 Q. B. 749.

general words must be treated, even when following the antecedent enumeration of particular cases, as having a wide application and construction, and not as being narrowed by the antecedent words. But my difficulty arises thus. In Maxwell on the Interpretation of Statutes, 4th ed. at p. 499, which I cite, not as an authority, but as a convenient frame on which to hang a series of cases to which I propose to refer, I find this: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to shew that a wider sense was intended." It will be observed that the course of reasoning which is there adopted inverts what Lord Esher M.R., Lopes L.J., and Rigby L.J. describe as the proper way of approaching the matter; they approach it by saying that you must give these general words, even when following the particular enumeration, their natural meaning, unless there is something in the instrument to be construed which prevents your doing so, while the passage in Maxwell says that you ought to begin by assuming that the general words are limited by the immediately preceding particular words, unless there is something on the face of the instrument which ought to lead one to refuse to apply the ejusdem generis rule.

I need only cite a few authorities on this point. The first is *Fenwick* v. *Schmalz* (1), the head-note to which runs thus: "The defendant agreed by charterparty to load the plaintiff's ship with coal, in regular and customary turn, 'except in cases of riots, strikes, or any other accidents beyond his control' which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, the defendant pleaded that he was prevented loading the vessel by a snow-storm which rendered it impossible to bring the cargo to the agreed place of shipment:—Held, on demurrer, that a snow-storm was not 'an accident' within the meaning of the exception and that the plea was bad." In the course of the argument Willes J.

(1) (1868) L. R. 3 C. P. 313.

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observed: "I should have thought the words 'other accidents' meant accidents ejusdem generis with riots and strikes, in which human instrumentality is concerned." That is very like the suggestion as to the genus made in the present case by Mr. Hamilton in his argument. In his judgment Willes J. says: "I am of opinion that the plaintiff is entitled to judgment. This was a contract to load in a reasonable time, 'except in case of riots, strikes, or any other accidents' beyond the defendant's control, which might prevent or delay her loading. The vessel appears to have been in her turn to load, and the time went by during which we must assume she should have been loaded, if nothing had happened. . . . . The defendant says that the cause of his delay was a fall of snow. . . . . Was the snow-storm, however, 'an accident beyond the control' of the defendant? No doubt it was beyond his control, but was it an accident? I think not, because an accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident; and, therefore, without going into the rule that general words are to be restricted to the same genus as the specific words which precede them, I think this natural occurrence did not come within the terms of the exception in the charterparty." It is true that the decision of Willes J. is based upon a ground which does not involve the propriety of the application of the ejusdem generis rule, but his interlocutory observation in the course of the argument leaves no doubt as to his view; it would not have been made had he thought that there was a rule of construction by which their wide and unlimited meaning ought to be given to general words following particular words. This, however, is only one of a series of cases, which I need not go through now, though I have verified the bulk of them. These cases do not shew the slightest trace of the existence of a general rule to the effect that one must begin by assuming that the general words have their wide natural meaning notwithstanding that they follow particular words, unlimited by those particular words, unless on the face of the instrument something can be found that justifies the application of the ejusdem generis rule. In Maxwell

it is further said, at p. 507: "Of course the restricted meaning which primarily attaches to the general word, in such circumstances, is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong." The series of cases to which I have referred are all cases which go to shew that the true rule is that the restricted meaning is the one which primarily applies. I may cite *Gibbs* v. *Lawrence* (1), where Wood V.-C. deals with the case before him upon the basis that the proposition that primarily the general words are to be treated as limited by the preceding particular words is the right sequence of thought. "I think the cases," he says, "which are very numerous on this subject, have some common principle upon which they all seem to have been decided, and which is not difficult of application with reference to gifts in general." Of course, it is more difficult of application when you come to a contract and remember that *Anderson* v. *Anderson* (2) was a case of a gift by a husband by a settlement on his wife, the words following a specific enumeration being confined to things ejusdem generis. I will not read the judgment at length, but the learned Vice-Chancellor in a lengthy judgment nowhere gives a hint that you are to start on the assumption that the general words have their wider natural meaning unlimited by the preceding words unless and until you find something within the four corners of the document which compels you to take another view. Under these circumstances I am not prepared to say that the construction which Channell J. has placed upon these words is wrong. It is quite possible that he might have arrived at another conclusion had there been evidence of experts shewing the way in which this clause had in previous times been accepted by underwriters and by shippers and shipowners and others interested in these matters; but there was no evidence on that head.

I should like to say one word upon the argument of Mr. Hamilton that the words "deemed by the master" required the master to exercise his personal discretion (as to which I quite agree), and that the master really abandoned his conventional jurisdiction to determine this question and handed it over

(1) (1860) 30 L. J. (Ch.) 170. (2) [1895] 1 Q. B. 749.

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to the time charterers; this latter proposition is, however, not made out by the evidence. Under the circumstances I think that this appeal must be dismissed.

FARWELL L.J. I am of the same opinion. I will take the points in the order in which they were dealt with by Mr. Hamilton. The first was the finding of fact that the port was not inaccessible. Paragraph 4 of the bill of lading is divided into two heads: the first is, "Should a port be inaccessible on account of ice, blockade or interdict"; the second, "or should entry or discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause," and so on. In my opinion the first part deals with a matter of fact common to all the world and not peculiar to this particular vessel; that is to say, the inaccessibility is to be determined by ascertaining whether vessels such as the vessel in question could or could not get in, and not whether the particular vessel could or could not so get in. Vladivostock, it is well known, is ice-bound during a certain portion of the year for vessels sailing to that port, and this points to the fact that the port would be ice-bound and inaccessible to all persons at a particular season. On the evidence here four vessels during the material days, namely, between February 12 and February 15, got into Vladivostock, and eight or nine got out. In my opinion Channell J. was right when he held as a matter of fact that the port was not inaccessible.

The second point is the question of ejusdem generis, upon which question I have felt much embarrassed by the superfluity of authority. In my opinion the ejusdem generis rule is merely one of the rules of construction applied by the Court in construing documents. It is perhaps not desirable, when dealing with the construction of statutes and mercantile documents, to cite authorities on the construction of wills, because a testator is of his own bounty doing what he pleases and there is no presumption that he will not be capricious. In a mercantile document or a statute there is a presumption that business men do not intend to do anything absurd, which is some slight guide; but in all cases it is a question of construction. Now there is no room for the application of the ejusdem generis doctrine unless there

is a genus or class or category—perhaps category is the better word, as "class gift" has a technical meaning in wills, and its employment might lead to confusion. Unless you can find a category there is no room for the application of the ejusdem generis doctrine, and in *Anderson* v. *Anderson* (1) there really was no category at all. That case is an illustration of the doctrine (and I think this is what Lord Esher M.R. meant) that, if you once find clear unambiguous words of gift in general terms, those words of general gift cannot be cut down by an enumeration of particulars preceding or following. On the construction of the document in that case there was as clear an intention as possible to give all the chattels and effects in and about not only the house, but the stables themselves, which were actually mentioned in the schedule, and the decision was not that the doctrine of ejusdem generis is not to be applied because it is a bad doctrine, but that it was not to be applied because the circumstances of the particular case did not admit of it. I cannot think that Lord Esher M.R. intended in any way to dispute the doctrine, because in the same year, in *Fuller* v. *Blackpool Winter Gardens Co.* (2), he applied it to the Dramatic Copyright Act. Moreover, *Anderson* v. *Anderson* (1) was referred to in the Court of Appeal in *In re Stockport Ragged, Industrial and Reformatory Schools* (3), which involved the construction of the words "any cathedral, collegiate, chapter, or other schools" in s. 62 of the Charitable Trusts Act, 1853; the words "other schools" were cut down so as to be ejusdem generis with those immediately preceding.

It is first of all necessary to find that the document in question in any case contains a category properly so called at all; when that is once determined in the affirmative, it becomes necessary to ascertain the items which fall within that category. Taking the words in the present case, "in consequence of war, disturbance or any other cause," Mr. Atkin contended that they meant any other cause of any nature or kind whatsoever, whether within or akin to the preceding words, "war or disturbance," or not. But when there is a clear category followed by words which

(1) [1895] 1 Q. B. 749. (2) [1895] 2 Q. B. 429.
(3) [1898] 2 Ch. 687.

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are not clear, unambiguous general words, it would violate a settled rule of construction to strike out and render unmeaning two words which were presumably inserted for the purpose of having some meaning. If Mr. Atkin had been able to suggest some matters other than disturbance by violent human interference which are ejusdem generis with war and disturbance, the case might be different; but he is driven to contend that the expression means every other cause of any kind. In *In re Richardsons and Samuel* (1) A. L. Smith L.J., in dealing with the construction of a charterparty (it being a lock-out case), said: "In my opinion the clause cannot be intended to cover all acts of the agent which he has carried out for his own purposes. Of course there must be some limitation put upon these words, otherwise the words that precede would be mere surplusage. In my opinion this clause must be read as covering exceptions ejusdem generis with those that precede it." That I understand to be also the opinion of the Court of Appeal in *Baerselman* v. *Bailey* (2), from which I will only cite the following passage in the judgment of Rigby L.J.: "During the argument I was disposed to put the limited construction upon the words 'or otherwise' which is suggested in the latter part of the judgment of the Court in *Norman* v. *Binnington* (3), probably because I did not recognize how much liability would remain if the wider construction is adopted." This means, as I understand it, "If there had been nothing else, and you had had to say it means every conceivable cause, then I should not have adopted this construction, but inasmuch as you do suggest a category containing other things beyond the limits of those suggested, and yet short of everything you can think of, you have got a category, and the question is whether it is within that category or not, and you do not restrict it necessarily to the two words which immediately precede, because you have found something else." Now, if the words in this case had been "in consequence of war, disturbance, or any cause whatsoever, whether similar to those preceding or not," there would have been no room for argument, because there would be no real

(1) [1898] 1 Q. B. 261, 266. (2) [1895] 2 Q. B. 301.
(3) 25 Q. B. D. 475.

category at all: it is universality, and not a category; it is the whole range of causes. But, inasmuch as you have simply the words "any other cause," which are ambiguous, then the rule does apply. The rule may be taken as stated by Lord Tenterden C.J. in *Sandiman* v. *Breach* (1): "Where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis." The same rule was applied in *Reg.* v. *Cleworth* (2), which turned on the construction of a statute enacting that no tradesman, artificer, workman, labourer or other person whatsoever should do or exercise any worldly labour, &c., on the Lord's Day. Cockburn C.J. said (3): "Then there is a general expression 'other person whatsoever'; but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the Legislature." Crompton J. and Blackburn J. both agreed. If, therefore, there is a category, then the rules, which have come down to us from former generations and which still remain in full force, will apply; it could not have been the intention of Lord Esher M.R. to overrule them. Having got a category, it remains to ascertain the extent of the limit which is to be applied. If no limit can be suggested other than those which are naturally to be inferred from the preceding words specified, and apparently specified for that purpose only, and the only alternative is to strike those words out, then the general rule still applies. Applying that rule in the present case, I hold that the words are restricted by the immediately preceding words, "war" and "disturbance," and the category contains war or disturbance or other violent acts attributable to human agency. Assistance is derived from the reference to ice two lines earlier in the same clause. It seems almost impossible to impute to the contracting parties an intention to insert the word "ice" when they have said "Should a port be inaccessible on account of ice, blockade or interdict," that is, ice or warlike operations, and yet have omitted it (although intending it to apply) in the very next paragraph, "or should entry and discharge

(1) (1827) 7 B. & C. 96, at p. 100. (2) (1864) 4 B. & S. 927.
(3) Ibid. at p. 932.

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at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause." I think that "ice" was there intentionally omitted, because it was not intended to apply. The result is that, in my judgment, this clause is to be construed according to the doctrine of ejusdem generis, and that the expression "any other cause" is so restricted.

The third point is simpler, and I agree with Channell J. in thinking that errors of judgment do not include a mistake in the construction of the charterparty.

The next point is one on which my Lord felt more doubt, but I see no reason to differ from Channell J., who took the view that, inasmuch as the charterers, instead of directing (as they were entitled to do) the captain to sign the bill of lading, signed it themselves for the captain, they were within their rights. No hardship can arise, because the charterers have agreed to indemnify the owners from all consequences. Whether they held the captain's hand and guided it, as Channell J. suggests, or whether they wrote it themselves for the captain, appears immaterial. The result is that, in my opinion, the appeal fails.

There is one other point which I ought to mention, as it was referred to by my Lord. I am not satisfied in this particular case that the captain did surrender the discretion that was given him under clause 4 to discharge at some other safe port or place; but I may add that, as at present advised, I think he was bound to exercise that discretion fairly as between both parties, and not merely to do his best for the shipowners, his masters, disregarding the interests of the charterers.

KENNEDY L.J. I am of the same opinion. As to the question of the validity of the signature of the bill of lading that was signed, not by the captain, but by the charterers for the owners and captain, I have shared the doubt expressed by Vaughan Williams L.J., but upon the whole I think that the judgment of Channell J. is right. My doubt has been resolved in this way. It does not lie in the mouth of the defendants to deny the authority of the signature as one made on behalf of the owners and captain, because they have themselves by the contract agreed that the captain shall act as the charterers shall direct, and

therefore a signature which the charterers have made as on behalf of the owners and captain must, I think, be treated, when they are sued by the shippers who put their goods on board, as a signature which they cannot repudiate, because they gave the charterers, in the express terms of their contract, the right of directing the signature to the document to be made, and must be taken impliedly to have given, both as against the captain and against themselves, an authority to the charterers to sign on behalf of either or both of them.

With regard to the other short and comparatively easy question as to whether or not error in judgment includes the misconstruction by the captain of the mercantile document by which he was bound, I add nothing to what has already been said. It seems to me clear that error in judgment could never be intended to mean misconstruction of the document; it means an error which certainly does not include a mistaken view of the legal rights relating to the duty to the shippers under the charterparty or bill of lading. I also think with Channell J. that the error in merely going back to Nagasaki, as pleaded, would not in itself be sufficient to excuse that which was really the act which did the mischief, namely, discharging the goods at Nagasaki.

I now come to the more material points, and upon them I desire to express my view carefully. Inaccessibility is a question of fact. I do not think inaccessibility as a fact excludes reference to a particular ship; it means, I think, inaccessibility for a ship such as the ship in the particular case. For example, inaccessibility might be one thing for a steamer and another thing for a sailing ship, but, subject to that, it is a fact relating to the conditions existing which affect the entrance of a vessel—the access of the vessel to the port for which she is destined; and it means, as it appears to me, either something which is a permanent obstacle to access, or, if the nature of the obstacle is not absolutely permanent, inaccessibility means an impossibility of access in respect of the duration of time which is so far lasting as to make the delay of the ship until the obstacle shall have ceased to exist a delay which would practically and in a mercantile sense frustrate the adventure. That state of things has been found by Channell J. not to have existed here. The existence of

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inaccessibility was not a question which under the terms of the bill of lading depended upon the opinion of the captain, but it was a question of fact to be decided upon the principle which I have stated, and in finding that the inaccessibility did not exist I think that Channell J. was perfectly right.

I now come to what is to my mind the difficult point in the case. We have to construe clause 4, which runs: "Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge," and so on. There are two kinds of condition in that sentence—the first, if a port is in fact inaccessible for three specified causes; the second, one of opinion, if the master deems entry and discharge unsafe. In regard to the question of ejusdem generis we have only to deal with the second. The doctrine of "ejusdem generis" is that you treat general words which might under certain circumstances have a wider meaning as being restricted because, according to the true construction of the immediately preceding expression, you find it to designate things which may properly be described as belonging to the same genus. Without going into the earlier cases, I may refer to the statement of the law by Lord Halsbury in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Frazer & Co.* (1) that "two rules of construction, now firmly established as part of our law, may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words which precede them." In this particular case, have we generic words that immediately precede? Is there a genus in the words "war" and "disturbance," which are the two words used in the clause which has to be considered? I think there is. It has been expressed by my Lord in the phrase "human instrumentality," and if it needs any expansion I should say "human instrumentality acting either in an orderly and regular fashion, as war, or in a disorderly and irregular fashion, as

(1) (1887) 12 App. Cas. 484, at p. 490.

disturbance, riot or mutiny," such as we know as a matter of history to have occurred at Vladivostock. That being so, we have here a genus, which we should not have found had such a third word, as "snow-storm," been introduced. Had the sentence run, "in consequence of war, disturbance, or winter snow-storms," there would have been no genus of a recognizable kind, for it would be too wide to say that genus means anything that prevents the vessel entering; there would have been in the same clause generically different things, followed by the words "or any other cause"; and, if we tried to find a genus, we should be driven to read "any other cause" as meaning any other cause which might cause risk to the ship, whatever the nature of that cause might be. But, having a genus in the words "war" and "disturbance," we ought to be guided, as many cases have decided, in construing words which, apart from the immediately preceding context of the clause to which they are attached, might have properly received a larger meaning. This point is dwelt upon still more fully by Lord Halsbury (1) when he is pointing out what he thinks is the mistake in the earlier judgment in the case of *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (2), the mistake in that case being that the Court, instead of looking for a genus, looked for an analogy, which was wrong. The genus must first be found, and then you must find whether the words that follow are applicable to the species enumerated belonging to the one genus. Lord Macnaghten, in the same case, says (3): "According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted in order to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases." In that case it was argued that perils of the sea practically meant perils of any kind affecting people on the sea, and that contention was rejected by the House of Lords. Here the only words in the

(1) 12 App. Cas. 484, at p. 491. (2) (1880) 6 Q. B. D. 51.
(3) 12 App. Cas. at p. 501.

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immediately preceding context are "war" and "disturbance," which are of the same genus in the sense that they both represent violent human action, orderly or disorderly, rendering the entrance of the vessel or discharge of the cargo insecure; and under those circumstances it seems to me that there is here every requisite for finding, as the learned judge below has found, that there is a genus. Ice does not belong to that genus; if it was really intended to introduce something so different from war or disturbance, ice would have been specifically mentioned. Under the circumstances I have no doubt that the judgment of Channell J. was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *W. A. Crump & Sons.*

W. J. B.

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[IN THE COURT OF APPEAL.]

ARMITAGE *v.* PARSONS.

Practice—Judgment—Default of Appearance—Costs—Judgment signed for too large an Amount—Amendment—Accidental Slip—Order XIII., r. 3; Order XXVIII., r. 11.

Where judgment has been signed in an action for a liquidated demand in default of appearance, and, through an error arising from an accidental slip, the amount included in the judgment for costs exceeds by a few shillings the amount properly allowable for costs, the judgment may be amended, under Order XXVIII., r. 11, by reducing it to the proper amount.

In an action by the plaintiff, as indorsee, against the defendant, as acceptor, of a bill of exchange for 2500*l.*, judgment was signed in default of appearance. The amount included in the judgment so signed for costs was 5*l.* 6*s.*, which exceeded by the sum of 12*s.* the amount properly allowable in the particular case according to the scale of costs in force with regard to judgments by default. The plaintiff having issued a writ of fieri facias upon the judgment, goods of the defendant were seized under the writ. The defendant applied to set aside the judgment as having been irregularly signed. An affidavit made by the clerk to the plaintiff's solicitors, who attended at the district registry when the judgment was signed, stated that he looked at the list of costs there exhibited, and inadvertently filled in the wrong amount.

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the defendant was not entitled to have the judgment set aside, and that there was power to amend it under Order XXVIII., r. 11, which ought to be exercised.

Anlaby v. *Prætorius*, (1888) 20 Q. B. D. 764, and *Hughes* v. *Justin*, [1894] 1 Q. B. 667, distinguished.

APPEAL from an order made by Ridley J. at chambers dismissing an appeal from the order of a district registrar refusing to set aside a judgment as after mentioned.

The plaintiff, as indorsee, sued the defendant, as acceptor, of a bill of exchange for 2500*l.*, claiming by the indorsement on the writ the amount of the bill, 20*l.* 10*s.* 11*d.* for interest at 5 per cent. per annum from October 1, 1907, to date of writ, interest on the sum of 2500*l.* at 5 per cent. per annum from date of writ until payment or judgment, and the sum of 3*l.* 3*s.*, or such sum as might be allowed on taxation, for costs. The writ, which was issued out of the Leeds District Registry, having been served, and the defendant not having entered an appearance, the plaintiff proceeded to sign judgment in the district registry. The sum for which judgment was signed included, among the other items, as to which there was no dispute, the sum of 5*l.* 6*s.* for costs. The plaintiff issued a writ of fieri facias upon the judgment so signed, under which the sheriff seized goods belonging to the defendant. An application was then made by the defendant to the district registrar to set aside the judgment on the ground that it was irregularly signed, inasmuch as the amount therein included in respect of costs was 12*s.* in excess of the amount properly allowable. The practice Masters have with regard to the procedure on signing judgment in default of appearance in the Central Office made a rule establishing a fixed scale of costs : see Practice Masters' Rules, r. 18. By that scale, in cases of default of appearance after personal service, the charge allowed, where the writ is for 100*l.* and over, specially indorsed, is in country and agency cases, and where service is effected more than five miles from the General Post Office, 5*l.* 6*s.*, and in town cases 4*l.* 14*s.* (1)

(1) See the Annual Practice, 1908, vol. 2, part ix. p. 807, title, Tables and Practice Masters' Rules, where these rules are described as "Office Rules settled by the Practice Masters," but it is stated that they have

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It appeared that in the district registries there has been adopted, as regards cases in which judgment is signed in default of appearance, a scale of fixed costs similar to that adopted by the practice Masters for use in the Central Office, with the exception that in the district registry scale 5*l.* 6*s.* is allowed in cases where the service was effected more than two miles from the district registry, and 4*l.* 14*s.* in other cases. The place where the writ was served on the defendant was within two miles of the Leeds District Registry.

In an affidavit made by him, the clerk to the plaintiff's solicitors who applied to sign the judgment at the district registry office stated that, in inserting the amount of the costs while at the district registry, he looked at the list there exhibited and inadvertently filled in the amount of 5*l.* 6*s.*

On the hearing of the application to set aside the judgment, the district registrar refused to set it aside, but amended it by reducing the amount for which it was signed by the sum of 12*s.* On appeal the learned judge affirmed his order.

Scott Fox, K.C., and *J. A. Compston*, for the defendant. This judgment was irregularly signed, and, that being so, the defendant is entitled ex debito justitiæ to have it set aside: *Anlaby* v. *Prætorius* (1); *Hughes* v. *Justin.* (2) In the latter case, where a judgment had been signed for a larger amount than was due, the Court of Appeal refused to amend the judgment and set it aside. [They also cited *Hodges* v. *Callaghan.* (3)]

Simon, K.C., and *McCardie*, for the plaintiff. First, the judgment cannot be treated as irregularly signed. The cases of *Anlaby* v. *Prætorius* (1) and *Hughes* v. *Justin* (2) are not in point. In those cases judgment had been wrongly signed, not merely as regards the amount of costs, but as regards the subject-matter of the action; in the one case because there had been no default in delivering a defence, the time for doing so not having expired when the judgment was signed, and in the other case

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no statutory authority and cannot be treated as directions of the Court under the Judicature Act, 1873, s. 22. For r. 18 of the Practice Masters' Rules see p. 818, ibid.

(1) 20 Q. B. D. 764.

(2) [1894] 1 Q. B. 667.

(3) (1857) 2 C. B. (N.S.) 306.

because the parties had previously agreed upon a sum to be paid in settlement of the matter, which had been paid. In this case the Court must under the circumstances be regarded as having awarded a gross sum for costs in lieu of taxed costs under Order LXV., r. 23, and the fact that the sum awarded for costs was by mistake too great according to the scale does not constitute an irregularity for which the judgment should be avoided. Secondly, the case is one to which the maxim "De minimis non curat lex" is applicable. Thirdly, this is the case of an "error arising from an accidental slip," which ought to be amended under Order XXVIII., r. 11, or Order LXX., r. 1.

Scott Fox, K.C., in reply.

SIR GORELL BARNES, PRESIDENT. The contest in this case turns upon the small sum of 12*s.*, but the points raised require to be treated with some accuracy, because underlying them is the question whether the defendant's counsel is right in his contention that even such a very small mistake as that in question cannot be amended, but entitles the defendant ex debito justitiæ to have the judgment signed in default of appearance for a sum of more than 2500*l.*, which is admittedly due, set aside altogether. The plaintiff issued a writ against the defendant, as acceptor of a bill of exchange for 2500*l.*, which had not been met, claiming a sum of 2520*l.* 10*s.* 11*d.* for principal and interest to the date of the writ, and interest from that date until payment or judgment, and also 3*l.* 3*s.* for costs, or such other sum as might be allowed for costs on taxation. The writ having been served, and the defendant not having entered an appearance, the clerk to the plaintiff's solicitors went to the office of the district registry at Leeds, whence the writ had been issued, for the purpose of signing judgment against the defendant in default of appearance, and for that purpose he followed the usual procedure, that is to say, he produced the writ which shewed the figures which I have mentioned, and also the indorsement of the time and place of service, and an affidavit of service of the writ; and thereupon judgment in the ordinary form, stating that, the defendant not having appeared to the writ, it was adjudged that the plaintiff should recover the sum of 2536*l.* 19*s.* 8*d.*, being

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the amount claimed for principal and interest, and 5*l.* 6*s.* for costs, was sealed with the seal of the district registry. The only question which arises is as to the costs, in respect of which a sum of 5*l.* 6*s.* was included in the judgment, whereas, it appears, the amount so included ought only to have been 4*l.* 14*s.* The defendant having applied to set aside the judgment on the ground of this slight defect, the district registrar refused to set it aside, but amended it by reducing the total amount by 12*s.*, the difference between the amount of costs which ought to have been allowed and that which was actually included. On appeal the learned judge at chambers affirmed the registrar's order, and from that decision the present appeal is brought.

It was argued before us for the defendant that the fact that the judgment was signed, not for the exact amount for which it should have been, but for a few shillings too much, entitles the defendant ex debito justitiæ to have the judgment set aside; and for that proposition reliance was placed upon the cases of *Anlaby* v. *Prætorius* (1) and *Hughes* v. *Justin*. (2) In my view neither of these decisions applies to the circumstances of the present case. They were both cases in which the plaintiff had no right to judgment for any debt at all; in the first case because the time for putting in a defence had not expired when the judgment was signed, and in the other case because, while the writ was outstanding and before it had been served, the plaintiff and defendant met together and agreed upon an amount to be paid by the defendant in settlement of the whole matter, which was accordingly paid. Therefore there was no debt due in either case when the judgment was signed, and in the latter case there was only some trifling amount due for costs. I do not think that either of those cases governs the present.

Reference has been made during the argument to several rules, the provisions of which it is material for the purposes of this case to consider. The first rule to which it is necessary to refer is Order XIII., r. 3, which provides that "where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail, to appear

(1) 20 Q. B. D. 764. (2) [1894] 1 Q. B. 667.

thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five per cent. per annum, to the date of the judgment, and costs." I will shew later on how that rule is in practice worked out as regards costs. In my opinion, Order XXVIII., r. 11, which provides that "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal," enables us to deal with this case so as to do substantial justice. The plaintiff's counsel contended that Order LXV., r. 23, was applicable to this case, but I am not prepared, as at present advised, to assent to his argument in that respect. As I have said, I think Order XXVIII., r. 11, is the rule which is applicable, and ought to be applied under the circumstances of this case. Another rule relied upon by the plaintiff's counsel was Order LXX., r. 1, which provides that "non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit." That rule was referred to in *Anlaby* v. *Prætorius* (1), but I do not think it necessary in this case to express any opinion as to its effect. Reverting to Order XIII., r. 3, I desire to explain how, as I understand the matter, in practice the provisions of that rule have been worked out as regards costs. It appears to be practically impossible that, in every one of the numerous cases in which judgment is signed in default of appearance, the matter should be dealt with by a Master personally. Consequently, the way in which these matters are dealt with is as follows. Order XLI., r. 4, provides that, in cases where judgment is not pronounced by the Court or a judge in Court, "the entry of judgment shall be dated as of the day on which the requisite documents are left with the 'proper officer' for the purpose of such entry, and the judgment shall take

(1) 20 Q. B. D. 764.

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effect from that date." Then by Order LXI., r. 1, provision is made that "the Central Office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business of the office shall be distributed among the departments in accordance with that scheme, and shall be performed by the several officers and clerks in the said office who are now charged with the same or similar duties, and by such others as may from time to time be appointed by lawful authority for that purpose." Among the departments mentioned in the scheme is the "writ, appearance, and judgment" department. In the district registries, where there is not so much work, and so many persons are not employed, as in the Central Office, there are, no doubt, clerks who perform for the district registrar similar functions to those which are performed by the officers in the Central Office in London. With regard to the costs which are to be included in a judgment signed in default of appearance under Order XIII., r. 3, the practice Masters appear to have laid down certain rules, which have no statutory authority, and cannot be treated as directions of the Court under the Judicature Act, 1873, s. 22, but are intended to be rules of practice for the information of the officials in the Central Office, whom it may concern, as to, among other things, the scale of costs which the Masters have fixed as being the right amounts to be allowed in respect of certain matters which are common form. Rule 18 of these Practice Masters' Rules, after referring to Order LXV., r. 23, provides that, in cases of default of appearance, after personal service, where the writ is for 100*l.* and over, specially indorsed, the amount allowable is, in country and agency cases, and where service is effected more than five miles from the General Post Office, 5*l.* 6*s.*, and in town cases 4*l.* 14*s.* In the district registries, at any rate in the Leeds District Registry, we are told that a scale of fixed costs has been adopted, as regards costs on judgments in default of appearance, which is similar to that adopted for the Central Office, except that, in the district registry scale, 5*l.* 6*s.* is allowed where the service is effected at a distance of more than two miles from the district registry office, and in other cases 4*l.* 14*s.* Therefore, as a matter of common form, when it is desired to sign judgment in default of appearance,

the clerk to the plaintiff's solicitor has to take the writ, which states the amount of the debt, and the interest and costs claimed, and other particulars, and the affidavit of service, and lay them before the official or clerk whose business it is to deal with the matter; and it is the duty of the latter to see that the judgment is in accordance with the writ, that there is the proper affidavit of service, that there has been no appearance entered, and that the costs included in the amount of the judgment are those which according to the practice rules ought to be allowed. In this case it appears that the clerk to the plaintiff's solicitors, when he went to sign judgment, made a mistake, and that, in inserting the amount of the costs, he looked at the list of costs exhibited in the district registry office, and inadvertently filled in the wrong figure. The clerk whose duty it was to seal the judgment does not appear to have discovered the error, and so the judgment was signed for 12*s.* more than it ought to have been. To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip which under Order XXVIII., r. 11, ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the insignificant amount of 12*s.* I do not think that by so amending the judgment any of the rules or any principle of law is infringed. For these reasons I think that the appeal should be dismissed.

FLETCHER MOULTON L.J. I regret that I cannot come to the same conclusion as the President and my brother Farwell in this case. When a defendant does not appear, but leaves his case in the hands of the Court, it is, in my opinion, the duty of the Court to see that judgment is not signed against him by default otherwise than in strict conformity with the rules of procedure. If a plaintiff under such circumstances signs judgment for a larger sum than he is entitled to, I think the defendant has, as a general rule, ex debito justitiæ a right to insist that the judgment so signed shall be set aside. It lies on the creditor, who is seeking to exercise the stringent power of signing judgment in default of appearance, to see that such a judgment is obtained in a strictly regular manner; and in such a case as I have mentioned no judgment of the Court has been

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properly obtained against the defendant. The only exception to this rule appears to be in cases where the powers of amendment given by Order XXVIII., r. 11, are properly applicable. Order LXV., r. 23, has, in my opinion, no application to such a case as this, but applies to a wholly different class of cases. By Order XXVIII., r. 11, it is provided that "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal." It is under that rule that my learned brothers consider that they are empowered to amend this judgment. There are two reasons why I cannot concur with them in exercising the power given by that rule. In the first place I do not think that this power ought to be exercised in order to assist a wrong-doer who is acting upon the judgment as unamended. In the present case the application was not by the plaintiff to be allowed to amend his judgment. He has issued execution upon the judgment, and it is only when the defendant claims his right to have the judgment set aside that the plaintiff asks that the judgment, which he is still enforcing, may be amended for his benefit. I do not think that under those circumstances we ought to exercise the power of amendment given by the rule. There is another reason, in my opinion, why we should not do so. I am not satisfied that this case is one of an "error arising from an accidental slip" such as ought to form ground for relief under the rule. I agree with the learned President's view of the manner in which what I may call a "standardization" of costs has in practice grown up as regards those cases in which judgment is entered in default of appearance. It would be useless to have innumerable formal taxations in respect of small amounts, all ending in a similar result. Therefore, in cases where a judgment is signed in default of appearance, in so far as it may be an inevitable result that certain costs should be allowed, it is a very proper practice that such costs should be allowed in accordance with a fixed scale, as a matter of course. But it appears that by the scale there is a difference in the amount fixed for costs according as the service was effected at a greater or less distance from the district registry. I do not

suggest that in this case the wrong amount was deliberately included in the judgment in respect of costs, but it does not appear from the affidavits that either the solicitor's clerk or the officer, whose duty it was to be careful, in the absence of the defendant, to see that the right amount was inserted in respect of costs, was in possession of any materials to warrant the one in inserting and the other in allowing the insertion of the larger rather than the lesser of the two figures given in the scale. That being so, I am not prepared to say that there was in this case such an accidental slip as would justify us in amending the judgment instead of setting it aside. Therefore, upon both the grounds which I have mentioned, I think that we ought not to exercise the power given by Order XXVIII., r. 11, and in my opinion the judgment should be set aside.

FARWELL L.J. I agree with the judgment of the President, and also with the view taken by my brother Fletcher Moulton as to Order LXV., r. 23; but I must confess that I cannot follow the view which the latter has taken with regard to amendment of the judgment under Order XXVIII., r. 11. In this case the judgment was signed under Order XIII., r. 3, for an amount exceeding 2500*l.* in a regular manner, except as regards a sum of 12*s.* for costs. When Order XIII., r. 3, speaks of "costs," it means, of course, such costs as are allowable on taxation. In the case of such costs as these, the defendant, who has not appeared, would have no notice of taxation, and the costs allowable would be matter of common form. In view of this the taxing Masters have settled a scale of fixed costs to prevent the necessity for a formal taxation before a Master in each case; and a similar scale has been adopted in the district registry. A list of the costs allowable was exhibited in the district registry office; and the clerk of the plaintiff's solicitors, who attended there for the purpose of signing judgment, states in his affidavit that he looked at the list, and inadvertently took the wrong figure. In my opinion that was an error arising from an accidental slip. I have, when a judge in the Chancery Division, often corrected similar errors of a far larger amount. If necessary, I should be prepared to agree with the plaintiff's counsel

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that this was a case in which the maxim "De minimis non curat lex" was applicable.

Appeal dismissed.

Solicitor for plaintiff: *Arthur E. Burton, for Armitage & Speight, Leeds.*

Solicitors for defendant: *Ward, Bowie & Co., for Walter & E. H. Foster, Leeds.*

E. L.

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[IN THE COURT OF APPEAL.]

COBBETT AND OTHERS *v.* WOOD.

Practice—Solicitor—Bill of Costs—Petition by Wife for Judicial Separation—Bill for extra Costs only—Bill for Party and Party Costs previously delivered to Husband—Insufficiency of Bill—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

The plaintiffs had acted as solicitors for the defendant's wife on a petition by her in the High Court for a judicial separation. The petition was dismissed, but the defendant was ordered to pay the costs as between party and party, and accordingly the plaintiffs delivered to him a bill of party and party costs. That bill having been taxed, the defendant paid to the plaintiffs the amount allowed upon the taxation. The plaintiffs then delivered to the defendant a bill in respect of the extra costs of the proceedings on the petition as between solicitor and client, which bill did not contain the items allowed in respect of party and party costs. This bill not being paid, the plaintiffs sued the defendant for the amount of it as for necessaries supplied to the wife:—

Held (reversing the judgment of Pickford J., [1908] 1 K. B. 590), that the bill was not a sufficient bill within the meaning of the Solicitors Act, 1843, s. 37, and therefore the action was not maintainable.

Quære whether in a case where the wife's petition had failed such an action could be maintainable.

APPEAL from the judgment of Pickford J. on the trial of an action by him without a jury.

The action was brought by a firm of solicitors to recover the amount of a bill of costs.

The plaintiffs had acted as solicitors for the defendant's wife on a petition presented by her in 1904 in the Probate, Divorce and Admiralty Division of the High Court for a judicial separation from her husband. In accordance with the usual practice

in that division, the husband had given security for the wife's costs. The petition was dismissed, but the defendant was ordered to pay the costs of the wife as between party and party. The plaintiffs accordingly delivered a bill of party and party costs to the defendant. These costs were taxed, and the amount allowed in respect of them was paid by the defendant to the plaintiffs. The plaintiffs subsequently delivered to the defendant the bill of costs on which the action was brought. That bill was headed: "In the High Court of Justice, Probate, Divorce, and Admiralty Division (Divorce). Your Wife *v.* Yourself. Petition for judicial separation. Costs as between solicitor and client, including costs not allowed as between party and party." The bill contained a number of items in respect of extra costs incurred as between solicitor and client in the proceedings in the High Court for a judicial separation. Most of these items were not included in the bill of costs as between party and party, but some of the items were contained in that bill, and were disallowed as between party and party on taxation. The items allowed on taxation of the bill for party and party costs were not included in the second bill. (1) The amount of the bill so delivered in respect of extra costs not being paid, the plaintiffs sued the defendant for the same as for necessaries supplied to the wife.

The objection being taken at the trial that the bill so delivered was not a sufficient bill within the meaning of the Solicitors Act, 1843, s. 37, the learned judge held that the bill previously delivered to the defendant in respect of the party and party costs and the bill in question must be regarded as one bill delivered in two parts, and therefore there had been a sufficient compliance with the terms of the section, and he accordingly gave judgment for the plaintiffs.

The defendant appealed. (2)

(1) The bill included items as to other matters than the proceedings for a judicial separation, which items were dealt with in the Court below, but did not form the subject of decision in the Court of Appeal. See the report, [1908] 1 K. B. 590.

(2) At the trial the question whether, in a case where the wife's petition had failed, such an action could as a matter of law be maintainable did not appear to have been raised. When the appeal first came on for hearing, that question was

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Langdon, *K.C.*, and *Le Riche*, for the defendant. The bill delivered in this case is insufficient, because it does not set out the whole of the items in respect of the business done. It only sets out the extra costs, and omits the party and party costs, which relate to the same business. It is impossible for the Master without having before him the items allowed in respect of party and party costs to ascertain what ought to be allowed by way of extra costs: *Waller* v. *Lacy* (1); *Pigot* v. *Cadman* (2); *In re Mercantile Lighterage Co.* (3) [They also cited *Drew* v. *Clifford*. (4)]

Simon, *K.C.*, and *Cyril Atkinson*, for the plaintiffs. It may be that the general practice is to set out the items of the party and party costs in the bill delivered by the solicitor to his client, because usually the bill of party and party costs would have been delivered, not to the client, but to the opposite party; and therefore the client would, if they were not set out, have no means of knowing what had been allowed as against the other party. That was the case in *Waller* v. *Lacy*. (1) The circumstances of the present case are very special, and are such that the general practice is not really applicable, because the reason for that practice does not exist. In this case the bill of party and party costs was delivered to the defendant himself. There is no reason why the bill of costs should not be delivered in parts, provided that in those parts taken together a complete account of all the charges made in respect of the particular piece of business is contained. All that is necessary in order to satisfy the statute is that the document

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raised by the President, and the case was adjourned to enable counsel to consider and deal with this point. When the appeal again came on, after the argument had proceeded some time, it appeared to the Court that the above-mentioned question could not be dealt with satisfactorily in the absence of further information as to the facts of the case, which the evidence at the trial did not afford, and, therefore, the appeal must be decided solely upon the same question as had been dealt with at the trial, namely, the question as to the sufficiency of the bill, and, as will be seen from the judgments, the Court guarded themselves against being supposed by implication to indicate any opinion to the effect that, in the circumstances, the action would have been maintainable, if a sufficient bill had been delivered.

(1) (1840) 1 Man. & G. 54.

(2) (1857) 1 H. & N. 837.

(3) [1906] 1 Ch. 491, at p. 495.

(4) (1825) 2 C. & P. 69.

or documents delivered should give to the client such fair and reasonable information as to the matters claimed for as may be sufficient to enable him to get the solicitor's charges properly taxed: *Cook* v. *Gillard* (1); *Haigh* v. *Ousey*. (2) It is submitted that, fairly construed, this bill incorporates by reference the items of the party and party bill of costs. In *In re Mercantile Lighterage Co.* (3) Warrington J. appears to have thought, in the case of a liquidator, that it was sufficient if the amounts claimed and allowed for party and party costs appeared in lump sums upon the bill. That case is really an authority in the plaintiffs' favour. [They also cited *Ottaway* v. *Hamilton* (4); *Ivimey* v. *Marks*. (5)]

Langdon, K.C., for the defendant, was not called upon to reply.

SIR GORELL BARNES, PRESIDENT. This is an appeal from a decision of Pickford J., who gave judgment for the plaintiffs in the action, subject to taxation of their bill, the ground of appeal being that the bill in question was not a proper bill within the meaning of the Solicitors Act, 1843, s. 37. To appreciate the points which have been raised, it is necessary to state the facts, which may be done very shortly. The plaintiffs are the solicitors who represented the wife of the defendant in proceedings which she took in the Probate, Divorce and Admiralty Division of the High Court for a judicial separation, and which failed. In accordance with the practice in that division, security had been given by the respondent for such amount of costs as would be necessary for the purpose of bringing the petitioner's case to trial and for the costs of the trial; and, after the suit was over, the costs were taxed in the usual way, and the amount allowed was paid by the husband. Generally speaking, the costs so taxed are practically sufficient to remunerate the solicitor in respect of the work and expenditure that are really necessary for bringing the case to trial. Some costs claimed by the plaintiffs in this case were disallowed upon that taxation. The plaintiffs subsequently delivered to the

(1) (1852) 1 E. & B. 26.
(2) (1857) 7 E. & B. 578.
(3) [1906] 1 Ch. 491, at p. 495.
(4) (1878) 3 C. P. D. 393.
(5) (1847) 16 M. & W. 843.

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defendant, who was the respondent in the proceedings for a separation, a bill headed thus: "In the High Court of Justice, Probate, Divorce, and Admiralty Division (Divorce). Your Wife *v.* Yourself. Petition for judicial separation. Costs as between solicitor and client, including costs not allowed as between party and party." That bill did not contain the items which had been allowed as party and party costs in the proceedings for a separation or the amounts which had been received by the plaintiffs in respect of them. The bill was in effect, except as regards certain minor matters to which I will refer later on, a bill of extra costs as between solicitor and client in respect of the suit for a judicial separation. The plaintiffs upon July 24 in last year commenced an action claiming the amount of the bill, and, application having been made for leave to sign judgment in the action under Order XIV. in the district registry, the result was that the learned judge, who was then at Liverpool, heard the case as a short cause, and gave judgment as I have mentioned. I understand that before the judge the defendant's counsel in effect admitted for the purposes of the trial that the defendant was liable, if the bill delivered was a proper bill, and the important question was not raised whether the husband could be made responsible for the extra costs of suit in a case like this, where the wife's suit had failed. I do not propose to discuss any of the points connected with that question, because, although this case was adjourned on a previous occasion at my suggestion, in order that counsel might have an opportunity of dealing with that question as a matter of law, it now appears to us that it would be impossible satisfactorily to deal with it without further information as to the facts of the case than, as matters stand, we possess, and we therefore have come to the conclusion that the case must be dealt with on the basis of the admission which was made by the defendant's counsel before Pickford J., and upon which he dealt with it. I have been careful to say this, because I do not wish, as at present advised, to be taken as expressing any opinion in favour of the view, or as encouraging the notion, that, where a suit by a wife for a judicial separation has been dismissed, and the amount allowed in respect of the party and party costs (which in practice seems to have been found sufficient to enable

a wife to have her case properly heard) has been received by the wife's solicitors, an action for extra costs may be maintained against the husband. I express no opinion on that point, though I do not recollect at the moment any case in which extra costs have been recovered in such a case, or in which even an attempt has been made to recover them, except the present case.

The only question, therefore, with which we propose to deal is whether Pickford J. was right in holding, as he did, that the bill delivered in this case was a proper bill within the meaning of the Solicitors Act, 1843, s. 37. That section provides that no attorney or solicitor "shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after such attorney or solicitor . . . . shall have delivered unto the party to be charged therewith . . . . a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership) . . . . or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill." The point taken on behalf of the defendant is that no sufficient bill has been delivered of the fees, charges, and disbursements in respect of the business done by the plaintiffs, i.e., the conduct of the suit in the Probate, Divorce and Admiralty Division, inasmuch as the bill delivered only sets out the extra costs as between solicitor and client, and there is nothing in it to shew what costs were claimed, or were allowed, as between party and party, and no means are therefore afforded to the taxing Master by the bill for determining the proper amounts, if any, to be allowed as extra costs. There appears to have been for a long time a uniform practice in the taxing offices in relation to this question. In 1904 the matter was considered and reported upon by the Masters, and their report was, at the request of the Lord Chancellor, considered by Kekewich J. It was then stated by the Masters that in such cases the long-settled practice of the taxing office is to require the whole bill to be brought in for taxation, including the party and party items, and

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the usual taxing fees are taken upon the bill thus taxed; or in other words that, in carrying out the provisions of s. 37 of the Solicitors Act, 1843, the bill of which it requires delivery is held to be a complete bill of all the fees, charges, and disbursements in reference to the business to which it relates, and therefore such a bill as will enable the Master properly to tax the costs in respect of which the claim is made. I therefore come to the conclusion that, having regard to the provisions of the Act, and the settled practice with respect to the mode in which they have been carried into operation, and also to the authorities on the subject, the defendant is right in contending that the bill in this case, not being a complete bill in reference to the business done by the plaintiffs, was not a proper bill within the meaning of the Act. Pickford J. took a different view, but he had not the advantage of such a full discussion of the authorities as there has been before us, or of the information which we have received from the Masters with regard to the way in which the provisions of the statute have been carried out in practice. It was suggested that, under the special circumstances of this case, the practice to which I have alluded was inapplicable, but I cannot see any ground for that suggestion. The result is that, no proper bill having been delivered, the plaintiffs' action is not maintainable, and the appeal must be allowed.

There are some minor items in the bill which do not relate to the suit in the Probate, Divorce and Admiralty Division. With regard to the costs of the proceedings before the magistrates (1), Pickford J. held himself bound by the decision in *Cale* v. *James* (2), and therefore gave judgment for the defendant as to those items. There were also some small items in respect of work which was independent both of the proceedings in the High Court and those before the magistrates. I think, however, that the subject of contest at the trial was substantially the question whether the bill delivered by the plaintiffs was a proper bill, having regard to the fact that it omitted the items which had been included in the party and party costs, and that these small items were never discussed independently of that question.

(1) See report in Court below, [1908] 1 K. B. 595.
(2) [1897] 1 Q. B. 418.

Therefore I do not think that we ought to go into those matters on this appeal.

I think I ought to say, with regard to the observations which have been cited from the judgment of Warrington J. in *In re Mercantile Lighterage Co.* (1), that I must confess I do not quite understand that part of his judgment where he said that there was no valid objection to the mode in which the party and party costs were included in the bill, namely, in a lump sum, and that this was in accordance with the usual practice. That does not seem consistent with the report made by the taxing Masters as to the existence of a well-settled unwritten practice in such cases to set out the items of the party and party costs. The question in that case appears to have been whether the items in respect of party and party costs ought to have been included in the liquidator's bill at all. It does not appear that any objection was taken to the mode in which those costs were set out in the bill, namely, in a lump sum, and, that being so, I doubt whether the learned judge can be supposed to have intended to express a definite opinion to the effect that this could be done as of right.

FLETCHER MOULTON L.J. In this case a preliminary objection is taken by the defendant to the maintenance of an action on a solicitor's bill. By s. 37 of the Solicitors Act, 1843, it is in substance provided that no action shall be maintainable by a solicitor for the recovery of any fees, charges, or disbursements in respect of any business done by him until the expiration of a month after a proper signed bill has been delivered by him in accordance with the provisions of the section. The objection is taken by the defendant that no such bill has been delivered in the present case, and, if that objection is substantiated, the action will not lie, and the judgment must be for the defendant. The objection is to the form of the bill, and has nothing to do with the validity of the items contained in it. A bill might be a sufficient bill in point of form, though nine-tenths of the items might be disallowed on taxation after judgment at the trial. The question whether judgment ought to be given in the action for

(1) [1906] 1 Ch. 491, at p. 495.

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the amount which may be found due on taxation depends on whether the bill is in point of form such as is required by the statute. I can see no reason why a solicitor's bill may not be delivered in parts, or why successive bills, respectively shewing the costs due down to a certain date, or including particular groups of items, may not be delivered, provided that it clearly appears that they are all really parts of one bill. The question here is whether the bill delivered, when judged by what appears upon the face of it, purports to be such a bill as is in accordance with s. 37. In my opinion it does not, and therefore the judgment in the action ought to be for the defendant. I do not, speaking for myself, base my judgment upon any rule of practice, because the circumstances under which this bill was delivered are so special that it is difficult to see how any settled rule of practice can apply to them. I should think that it can very rarely, if ever, have happened before that a solicitor representing a wife, whose petition for a judicial separation has failed, has sued the husband for extra costs. It appears from what the learned President has said, and on the authorities, very doubtful whether such an action will lie. I propose, therefore, to consider the matter solely by the light of the section, and apart from any supposed practice in the matter. The bill purports to be a bill of costs in respect of a petition for judicial separation, and to contain only the extra costs as between solicitor and client, including costs not allowed as between party and party. Such a bill does not appear to me to be a complete bill of the fees, charges, and disbursements due in respect of the business done by the solicitors within the meaning of the section. The only way in which it can be suggested that it is such a bill is by saying that it must be read together with the previous bill which was delivered to the same person for taxation in the High Court and taxed as between party and party, and the amount allowed on which has been received by the plaintiffs. But, if I take the bill, and treat it as part of a total bill made up by reading it with the former bill, it appears to me impossible even so to make out that a proper bill has been delivered within the meaning of the Act. Taking one of the items by way of illustration, I find an item in respect of instructions for brief, which is stated to be in

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addition to the amount allowed on taxation as between party and party. What amount was so allowed would not appear from the signed bill delivered to the husband for taxation as between party and party. So that, taking the two signed bills together, they do not purport as regards that item to be a bill giving all necessary information as to the claim made by the plaintiffs against the defendant. Under these circumstances I do not think that this can be regarded as a proper bill within the meaning of the statute.

FARWELL L.J. I agree with the view taken by the President. I express no opinion on the question whether such an action as this could in any case be maintainable; but, putting that question aside, I do not think that it is competent for a solicitor, where there has been a taxation of costs as between party and party, to deliver to the client a bill of the items not allowed on that taxation as a separate bill. The bill of fees, charges, and disbursements contemplated by s. 37 is, I think, a complete bill of the whole of the fees, charges, and disbursements in respect of the particular business done. The plaintiffs' counsel argued that the circumstances of this case are of such a special nature that the general practice in relation to these matters is not applicable. I cannot assent to that contention. The words of s. 37 are quite general, and impose the same duty upon the solicitor in respect of delivering a proper bill in all cases. I should like to refer in this connection to the report signed by the taxing Masters, in 1904, to which the President has alluded. After stating the practice, they say, "It has been held to be impossible properly to consider the solicitor and client bill in any other way, as the extra charges by themselves are not intelligible: see judgment of Tindal C.J. in *Waller* v. *Lacy*. (1) The practice of the taxing office is founded on authority, is necessary for the protection of clients, and should not we think be altered." At the Lord Chancellor's request this minute was considered by Kekewich J., who pronounced his opinion upon it as follows: "Undoubtedly the taxing Masters are right. Taxation as between solicitor and client necessitates the whole bill being

(1) 1 M. & G. 54, at p. 69.

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before the Master, notwithstanding that it has already been taxed between party and party, and there is no reason why the fee should not be assessed on the whole bill thus submitted." It seems to me quite impossible to make this case an exception from the general practice on the ground, ingeniously suggested by the plaintiffs' counsel, that the defendant, having had a bill delivered to him a year ago in respect of the party and party costs, might hunt up that bill, and discover by examination of it what was allowed in respect of those costs. I agree with my brother Fletcher Moulton that probably he would not be able to do so, but in any case I do not think he is bound to do this in order to enable the solicitor to escape from his obligation to deliver a proper bill of costs.

Appeal allowed.

Solicitors for plaintiffs: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendant: *C. P. Fielder, Le Riche & Co., for A. J. Stead, Manchester.*

E. L.

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Life Insurance—Statement agreed to be Basis of Contract—Effect of—Non-disclosure of material Facts—Absence of Fraudulent Intent—Avoidance of Policy.

The testatrix of the plaintiff effected with the defendants an insurance upon her own life in pursuance of a proposal in which she made certain statements the truth of which was not disputed. She signed a declaration that the statements so made were true, and agreed that the proposal and declaration should be the basis of the contract. Subsequently, but before execution of the policy, she was interrogated on behalf of the defendants (1.) as to whether she had ever suffered from mental derangement, and (2) as to the names of any doctors whom she had consulted. She answered the first question in the negative, whereas in fact she had been in confinement for acute mania; and, in answering the second, she omitted to disclose the name of a doctor whom she had consulted for nervous depression. At the same time she signed a further declaration that those answers were true. But this declaration did not state that the answers were to form part of the basis of the contract. The policy did not refer to either the proposal or the second declaration. The assured subsequently committed suicide. The defendants resisted the plaintiff's claim under the policy upon the ground of the above-mentioned misstatement and non-disclosure. The jury found that the assured had no knowledge of the fact that she had been insane; that the name of the doctor so consulted was a matter which it was material for the defendants to know; but that, though she knew she had consulted the doctor in question, she was not aware that the communication of that fact was material:—

Held, that the agreement in the first declaration, that that declaration and the proposal should be the basis of the contract, did not exclude the materiality of the answers stated in the second declaration to be true, so as to prevent the misrepresentation and non-disclosure complained of from avoiding the policy in the absence of a fraudulent intention on the part of the assured.

Further Consideration before Lord Alverstone C.J. after trial with a jury.

The plaintiff was the executrix of the will of Robina Morrison, deceased. The action was upon a policy of insurance dated November 4, 1902, whereby the said Robina Morrison insured her life with the defendants for a sum of 3000*l*. The insurance was effected in pursuance of a proposal the printed form of

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which contained certain questions put to her by the defendants as to her date of birth, as to whether her life had been previously proposed for insurance, as to the names of two friends who knew what her health and habits were, as to whether she had any profession or occupation, and as to whether she had ever been out of Europe or intended going out. She answered those questions upon the form, and it was not disputed that her answers were true; and at the end of the form she signed a declaration, dated October 27, 1902, wherein she declared that, to the best of her knowledge and belief, the particulars given were true, and agreed "that this proposal and declaration shall be the basis of the contract" between her and the defendants. On October 31, 1902, certain questions contained in a second printed form were put to her by the medical officer of the defendants. Amongst other questions, she was asked to give the names of any medical men consulted by her, in reply to which she gave the names of two doctors only, a Dr. Scott and a Dr. Hodson, whom she said she had consulted for colds and measles respectively. She was also asked whether she had at any time suffered from "mental derangement," her answer to which was in the negative. These answers were filled in by the medical officer upon the form, at the end of which was the following declaration, which she signed: "I the said Robina Morrison do hereby declare with reference to the proposal for assurance on my life and my declaration dated October 30, 1902 (1), that the answers to the foregoing questions are all true."

The policy, which was executed on November 4, contained no reference to the proposal or to either of the declarations.

It was admitted by the plaintiff that the deceased had in fact suffered from acute mania, and that from January to August, 1895, she had been in confinement in the house of a Dr. Leach; that she had in December, 1894, consulted a Dr. Kinsey Morgan for nervous depression, and that it was upon a certificate signed by him that she had been so placed under restraint. On March 6, 1906, Robina Morrison committed suicide while of unsound mind. The defendants, in answer to the plaintiff's claim, contended that the policy was void by reason of the deceased's

(1) This was evidently a mistake for October 27.

untrue statement that she had not suffered from mental derangement and her omission to disclose the fact that she had consulted Dr. Kinsey Morgan. The Lord Chief Justice left the following questions to the jury:—

1. "Did the deceased lady Robina Morrison know in October, 1902, that she had suffered from mental derangement?"—Answer. "No."

2. "Did the deceased lady Robina Morrison fraudulently conceal from the defendants the fact that she had suffered from mental derangement?"—Answer. "No."

3. "Did she fraudulently conceal from the defendants that she had consulted Dr. Kinsey Morgan in the year 1894 for nervous depression?"—Answer. "She foolishly but not fraudulently concealed this fact."

4. "Was the fact that she had consulted Dr. Kinsey Morgan for nervous breakdown in the year 1894 material for the company to know in considering whether they could insure Robina Morrison's life?"—Answer. "Yes."

Upon these findings he reserved the case for further consideration.

Montague Shearman, K.C., and *Boydell Houghton*, for the defendants. The deceased by her declaration of October 31 warranted her statements, that she had not suffered from mental derangement and that she had consulted no doctor except the two whom she named, to be true. For that declaration was expressed to be made "with reference to" the proposal, and the earlier declaration of October 27, which was agreed to be the basis of the contract, and the second declaration must be read as incorporated in the earlier and as being itself part of the basis of the contract. Those statements, being in fact untrue, render the contract of insurance void, whether the deceased had a fraudulent intention or not. The insurance having been effected by the defendants upon the faith of those statements, it is immaterial that neither the proposal nor the declarations are mentioned in the policy: *Wood* v. *Dwarris*. (1) Secondly, even if the second declaration was not part of the basis of the

(1) (1856) 11 Ex. 493.

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contract, the policy was void, for the misrepresentation as to the deceased's mental derangement and the non-disclosure of the name of Dr. Kinsey Morgan were misrepresentation and non-disclosure of material facts; and misrepresentation or concealment by the proposer as to or of any fact which it is material for the insurer to know avoids the policy although it was not fraudulent. No distinction in this respect is to be drawn between policies of life insurance and policies of marine insurance. "The general principles of insurance law apply to all insurances whether marine, life, or fire": per Lord Blackburn, *Thomson* v. *Weems*. (1) It is the duty of a person effecting an insurance on his life to communicate to the insurer all material facts within his knowledge touching the subject-matter of the insurance: *Lindenau* v. *Desborough* (2); *London Assurance* v. *Mansel* (3); and whether a particular fact is material or not is a question for the jury to determine. That the assured did not know that it was material is altogether irrelevant: *Lindenau* v. *Desborough*. (2) A fact which the jury in the present case thought material was present to the mind of the deceased, and she omitted to disclose it.

Lush, K.C., and *Hon. S. O. Henn Collins*, for the plaintiff. There was no agreement that the correctness of the answers in the declaration of October 31 should be the basis of the contract. If it had been so intended, the declaration would have said so in terms, as was done in the first declaration. The words "with reference to" were merely to identify the particular insurance with respect to which the questions were asked; they cannot be taken as incorporating the second declaration in the first. Then, if the answers were not part of the basis of the contract, their incorrectness will not avoid the contract in the absence of fraud, for they were not material. Their materiality is excluded by the terms of the first declaration. The defendants by making that declaration the basis of the contract impliedly state that nothing shall be regarded as material except the answers in the proposal. The law on this point is thus stated in Leake on Contracts, 5th ed. p. 275: "According to the ordinary practice

(1) (1884) 9 App. Cas. 671, at p. 684. (2) (1828) 8 B. & C. 586.
(3) (1879) 11 Ch. D. 363.

of life insurance the insured is required to make and sign a declaration giving certain specified information concerning the life insured, and it is expressly stipulated that such declaration is true and is to be taken as the basis of the contract; the effect of which is that if there is anything untrue in that declaration, whether to the knowledge of the insured or not, and whether material or not, it avoids the contract. On the other hand, such declaration expressly defines and limits by agreement the rights of the insurer as to the communication and materiality of facts; and excludes any effect upon the contract from misrepresentation or non-disclosure of a matter not specified in the declaration, unless fraudulent." Here, the jury having negatived fraud, the defendants cannot be heard to say that the misrepresentation and non-disclosure complained of were material inducements to the contract. But further, even if they were material, they would not avoid the policy in the absence of fraud. In *Hambrough* v. *Mutual Life Insurance Co. of New York* (1) Lopes L.J. said: "In policies of insurance on life an erroneous statement respecting the life insured, or mere silence respecting a material fact, in the absence of any fraudulent intention, does not avoid the policy, unless the policy contains an express proviso that it shall be conditional upon the truth of the declaration made by the insured." In any case it is too late for the defendants to claim to rescind the contract, for the life insured having died, it is no longer possible to restore the parties in integrum.

Boydell Houghton in reply.

Cur. adv. vult.

May 18. LORD ALVERSTONE C.J. This was an action brought by the executors of Robina Morrison against the defendants to recover the sum of 3000*l.* under a policy of insurance payable on the death of the deceased. Payment was resisted on the ground that the deceased, in answering certain questions put to her at the time of her effecting the insurance, made certain untrue representations.

The insurance was effected in pursuance of a proposal dated October 27, 1902, signed by the deceased, in which she made

(1) (1895) 72 L. T. 140.

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certain statements, none of which were alleged to be untrue. At the end of the form the following printed declaration was signed by her: "I the above-named R. Morrison do declare that to the best of my knowledge and belief the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the Law Union and Crown Insurance Company." Subsequently, on October 31, 1902, Mr. Bernard Scott, a medical man selected by the defendants, interviewed her and asked her certain questions, the answers to which he recorded, and which were put in at the trial. The material questions and answers were as follows:—

"What medical man have you consulted? When? What for?"—Answer. "Dr. T. B. Scott, Bournemouth—rarely (colds); Dr. Hodson, Brighton—last spring (measles)."

"Have you at any time had, and if so when, any of the following ailments:—(*a*) . . . .; (*b*) apoplexy, palsy, fits of any kind, mental derangement, brain fever, or other disease of the brain?" —Answer. "No."

Mr. Bernard Scott was not called. On this occasion the deceased signed another declaration, which was in the following form: "I the said Robina Morrison do hereby declare with reference to the proposal for insurance on my life and my declaration dated October 30, 1902, that the answers to the foregoing questions are all true." It was not disputed that in December, 1894, the deceased lady suffered from a very severe attack of influenza, followed by nervous depression which ultimately developed into acute mania, and that for six months, that is to say, from January to August, 1895, she was in the charge of Dr. Leach at a private establishment at Sturminster; that for a time she suffered from acute mania, was very violent, and that she gradually recovered and was discharged about the month of August, 1895. The plaintiff alleges that the deceased lady was always ignorant of the fact that she had suffered from mental derangement, or had been under restraint, and always believed that she had been sent away for a rest cure for nervous breakdown. This was the account which she gave to a doctor who was called in some months before her death, which occurred by suicide in the month of March, 1906. The defendants called expert witnesses who expressed the opinion

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that the lady must have known of her mental derangement and of her being placed under restraint, and that she had wilfully concealed the fact in answering the question above referred to. I left the following questions to the jury, which they answered as indicated. [His Lordship read the questions and answers as above set out.]

Upon these findings, which were, in my opinion, quite in accordance with the evidence, the defence of fraud fails. The case was argued before me on further consideration. It was contended by Mr. Shearman and Mr. Houghton, for the defendants, that the policy was void on the ground that the two declarations made by the deceased were the basis of the contract between her and the defendants; secondly, that, even assuming this not to be the case, the defendants were not bound by the policy on the ground of the incorrect answers to the questions above referred to; and, thirdly, that, this being a policy of life insurance, it was void on the ground that the deceased had not made full disclosure.

The first question is one of construction and, in my opinion, of considerable difficulty, and I express my opinion thereon not without some doubt. The policy, which was dated November 4, 1902, was absolute in its terms, and contained no reference either to the proposal form or to the answers to the questions; but, in my opinion, having regard to the decision of *Wood* v. *Dwarris* (1), this would be immaterial if, by agreement between the parties, the questions were made the basis of the contract and were untrue in fact. To my mind it is difficult to say what the exact meaning of the words "with reference to my declaration dated October 30, 1902," was. The only declaration was that of October 27, but I think it must be taken that the later declaration refers to that. It must be remembered that the document upon which the second declaration was made was sent to the doctor, and he was asked to obtain the answers to the several questions. Upon the whole, not, as I have said, without doubt, I come to the conclusion that the documents are not sufficient to make the answers to the questions the basis of the contract, and that the defendants are not entitled to succeed upon the simple

(1) 11 Ex. 493.

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ground that an untrue answer has been made to a question, which question was agreed between the parties to be the basis of the contract.

I have now to deal with the remaining points urged upon behalf of the defendants, which may, I think, be stated compendiously, that the answers to both or either of the questions entitle the defendants to revoke the policy. Although, as I have said, in my opinion the language of the second declaration is not sufficient to make the contract void upon the ground that the answers to the questions were the basis of the contract, it does, in my opinion, establish that the deceased knew, or ought to have known, that she was being questioned on behalf of the company as to matters which they considered to be material in determining whether they could insure her life. As regards the second question, namely, that which related to mental derangement, it must be taken, having regard to the answer of the jury to the first question, namely, that she did not know that she had suffered from mental derangement, that she innocently misrepresented a material fact. As regards the question respecting the doctor, it must be taken, having regard to the answers to the last two questions, that she innocently concealed a material fact. It was admitted by the plaintiff that as soon as the defendants knew the facts they claimed to revoke the policy. It seems to me that, having regard to the principle to be deduced from the long course of decisions, it is now well established that in a policy of insurance concealment of a material fact invalidates the policy. It is unnecessary to cite many decisions, but I would refer to the language of Lord Blackburn in *Brownlie* v. *Campbell* (1): "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrima fides (2), that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids

(1) (1880) 5 App. Cas. 925, at p. 954. (2) *Sic.*

the policy." The same principle is clearly recognized in *London Assurance* v. *Mansel.* (1) See particularly the passage quoted from the judgment of Lord Cranworth in *Dalglish* v. *Jarvie* (2): "If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy"; and the passage quoted from the judgment of Parke B. in *Moens* v. *Heyworth* (3): "The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect." As I have already said, there are many cases in which this principle has been recognized. It was contended by Mr. Lush that the passage in the judgment of Lopes L.J. in *Hambrough* v. *Mutual Life Insurance Co. of New York* (4), in which he says, "Now I think this is a very good statement of the law: In policies of insurance on life an erroneous statement respecting the life insured, or mere silence respecting a material fact, in the absence of any fraudulent intention does not avoid the policy, unless the policy contains an express proviso that it shall be conditional upon the truth of the declaration made by the insured," was contrary to this view. I doubt whether the opinion therein expressed was necessary for the decision of the case, but if it is assumed to apply to all cases, I think the language goes too far and is not consistent with the decisions to which I have already called attention. It was further contended on behalf of the plaintiff that, inasmuch as the death had occurred before repudiation, the parties would not be restored to their original position, and the plaintiff was entitled to recover. But in the case of *Lindenau* v. *Desborough* (5) the policy was held void after death on the

(1) 11 Ch. D. 363.
(2) (1850) 2 Mac. & G. 231, at p. 243.
(3) (1842) 10 M. & W. 147.
(4) 72 L. T. 140.
(5) 8 B. & C. 586.

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ground that the assured did not communicate all the material facts within his knowledge touching the subject-matter of the insurance. It is unfortunate that in that case the terms of the policy are not given, and it may be that they were such as to have made it impossible for the plaintiff to recover, having regard to the concealment, but at any rate it seems to negative the view contended for by the plaintiff that the occurrence of the death is a conclusive answer to the defendants' argument. I am therefore of opinion that, notwithstanding the death of the deceased, it is still open to the defendants to raise the contention that the policy is void, and I come to the conclusion that the plaintiff's claim must be dismissed with costs. But, as I pointed out at the trial, in order to entitle the defendants to revocation of the policy—this not being a case of fraud—they ought to have tendered, or expressed their willingness to repay, the premiums. The defendants alleged that they could not adopt this course, inasmuch as they were alleging fraud, and probably this is so, but, in my judgment, fraud having been negatived, they are bound to repay the premiums, and therefore I should make the order similar to that made in *London Assurance* v. *Mansel* (1), namely, The defendants being willing and offering to return the premiums received, declare that the policy on the life of Robina Morrison was void and of no effect, and that the policy should be delivered up to the defendants to be cancelled.

Judgment for the defendants.

Solicitors for plaintiff: *F. Richardson & Sadlers, for Clayton & Gibson, Newcastle.*

Solicitors for defendants: *Robins, Hay, Waters & Hay.*

(1) 11 Ch D. 363.

J. F. C.

[IN THE COURT OF APPEAL.]

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March 16.

FINCH, APPELLANT *v.* BANNISTER, RESPONDENT.

Land Drainage—Neglect to cleanse and scour Channel—Injury to other "Land"—Water Mill—Land Drainage Act, 1847 (10 & 11 *Vict. c.* 38), *ss.* 14, 15.

By the Land Drainage Act, 1847, where by reason of the neglect of an occupier of land to cleanse and scour the channel of a stream lying in or bounding his land injury is caused to any other land, the occupier of that land may, after due notice, take steps to cleanse and scour the channel, and may recover the costs, or a just proportion of the costs, from the occupier whose neglect has caused the injury.

The respondent was the owner of a water mill, and the appellant was the occupier of adjacent land through or along which the water passed after it had gone over the mill wheel. A quantity of silt formed in the stream where it passed the appellant's land, and in consequence of the appellant declining to cleanse and scour the channel at that point the water was penned back so as partially to submerge the mill wheel. Proceedings having been taken by the respondent under the Land Drainage Act, 1847:—

Held (affirming the decision of a Divisional Court, [1908] 1 K. B. 485), that the provisions of the Act were confined to injury done to the land itself, and did not apply where the injury complained of was injury to a mill.

APPEAL of the respondent Bannister from a judgment of the Divisional Court, reported [1908] 1 K. B. 485, upon a case stated by justices, which was in substance as follows:—

A complaint was preferred by the respondent (1) under the Land Drainage Act, 1847 (2), against the appellant for that he,

(1) The terms "appellant" and "respondent" are used throughout this report with reference to the description of the parties in the case stated by justices, and not with reference to their position in the Court of Appeal.

(2) By the Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 14: "And whereas by reason of the neglect of or want of co-operation among the occupiers of lands to maintain the banks and cleanse and scour the channels of existing drains, streams, or watercourses, lying in or forming the boundaries of such lands, and being or leading to the outfall from such lands and from other lands, much injury is occasioned and improvement prevented, but sufficient powers do not at present exist to remedy the evil aforesaid; be it therefore enacted, that in all cases where by reason of the neglect of any such occupier to maintain or join in maintaining the banks, or to cleanse and scour or join in cleansing and scouring the channels, of existing

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the respondent, was the proprietor of certain lands in the county of Sussex, which were bounded by the channel of a certain stream, which stream also formed the boundary of certain lands of the appellant, and that, the appellant having neglected to cleanse and scour the channel of the stream, injury was caused to the land of the respondent, to wit, the blocking of the water wheel of the mill of the respondent. Notice to cleanse and scour the channel having been given by the respondent to the appellant under s. 14 of the Act, the appellant was summoned to shew cause why the justices should not grant a warrant or authority to the respondent to enter upon the lands of the appellant in execution of the necessary works for cleansing and scouring the channel of the stream.

At the hearing of the complaint the justices found that the respondent was the owner of a mill which, with its water wheel, was in existence before 1840, and which was worked by water power derived from a mill pond. The water, on leaving the mill pond and passing over the water wheel, flowed (after passing

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drains, streams, or watercourses, lying in or bounding the lands of such occupier, injury shall be caused to any other land, it shall be lawful for the proprietor or occupier of any land so injured to require the proprietor or occupier so neglecting as aforesaid, by a notice in writing . . . . effectually to maintain such banks or cleanse or scour such channels, ... and in case he shall neglect so to do it shall be lawful for the occupier of the land to which such injury shall be caused . . . . to execute . . . . all necessary works for maintaining or repairing such banks, or cleansing or scouring such channels as aforesaid." The section then proceeds to give a right to recover by a summons before justices the expenses, or a just proportion of the expenses, of executing the necessary works.

By s. 15: "Unless such drain, stream, or watercourse as aforesaid shall be a boundary of or immediately adjoining to the land of the occupier whose land shall have been injured by such neglect as aforesaid, it shall not be lawful for the occupier whose land shall have been so injured to enter upon the land of any other person in the execution of the works aforesaid without a warrant or authority in writing so to do from two or more justices, which warrant or authority such justices shall grant upon inquiry had before them, after a summons served upon the occupier of the land so to be entered upon, if it shall appear to such justices that the neglect of the occupier of the land so to be entered upon has occasioned injury to the lands of the occupier applying for such warrant or authority. . . . ."

under a road and a railway) into an open watercourse on the appellant's land which formed the boundary of the appellant's property. A quantity of silt was formed in the stream where it passed the appellant's land, which had the effect of penning back the water to the mill wheel and submerging the wheel to the height of a foot. The appellant declined to clean and scour the watercourse, though he was willing to allow the respondent to come on his land to clear out the watercourse at the respondent's own expense. The appellant had done nothing actively to prevent the flow of the water.

The justices were of opinion that the Land Drainage Act, 1847, applied, and that a mill and premises came within the description of "land"; they therefore held that the respondent was entitled to an order under s. 15 to enter upon the lands of the appellant in execution of the necessary works, but stated this case for the opinion of the Court.

The Divisional Court (Channell, Bray, and Sutton JJ.) held that the word "land" in s. 14 must be construed in its ordinary sense and did not include land covered with buildings such as a mill; they therefore reversed the order of the justices. (1) The respondent (Bannister) appealed.

March 13 and 16. *Hohler*, K.C. (*Harker* with him), for Bannister. The proceedings are taken under s. 15, an order of justices under that section being necessary, as the lands of the parties do not adjoin, but are separated from each other by the road and the railway; s. 14 is, however, the important section. The word "land" in that section is not limited to land in its ordinary natural state, but includes land with buildings upon it, and injury to land includes injury to a mill. The preamble to s. 14 shews that it was intended to give a speedy and effectual remedy for the non-cleansing of streams by riparian owners without regard to their then existing common law obligations; it created, as the Divisional Court held, a new obligation, and to cut down the meaning of the word "land" to land without buildings would be to narrow unnecessarily the scope of the Act. In s. 11 of the Act there is an incorporation of the Lands Clauses

(1) [1908] 1 K. B. 485.

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Consolidation Act, 1845, which gives a wide and inclusive interpretation to the word "lands."

[FARWELL L.J. The Interpretation Act, 1889, gives a wide interpretation to the word "land," only applying, however, to statutes passed after 1850; this looks as though prima facie the word was not so construed before 1850.]

The judgments in the Divisional Court ignore the preamble of s. 14, in which the word "improvement" appears. The widest interpretation should be given to such a phrase as the "improvement of land"; it includes an improvement put upon the land in the shape of a building, which should receive the benefit of the statutory provisions equally with the land itself. [He cited Callis on Sewers, p. 139.]

Macmorran, K.C., and *E. E. Humphrys*, for Finch. The scheme of the Act is to deal with the drainage of land, and it provides a quicker and more appropriate remedy than then existed in cases where the adequate drainage of land is prevented by the silting up of the channel in or bounding the land of another riparian proprietor. There is no common law obligation upon one landowner to cleanse a stream for the benefit of another landowner where it has become silted up—*Hodgson* v. *York Corporation* (1); *Colchester Corporation* v. *Brooke* (2)—and where a statute is intended to take away or prejudicially affect the interest of a landowner without compensation, the language used must give a clear indication of such an intention: *Easton* v. *Richmond Highway Board*. (3) The obligation which it is sought to impose in the present case of cleansing the stream at his own cost is a serious one, and it may well have been that the silting up was caused by the mill itself. Full effect is given to s. 14 by interpreting it to mean that, where it is necessary for the drainage of a particular estate or property, the owner may require a landowner further along the stream to prevent its silting up.

Hohler, K.C., in reply. It is incorrect to say that s. 14 necessarily imposes the whole expense of clearing the stream on the other riparian owner; it is only a just proportion of the expense, that is, such a proportion as the justices think reasonable.

(1) (1873) 28 L. T. (N.S.) 836. (2) (1845) 7 Q. B. 339, at p. 374.
(3) (1871) L. R. 7 Q. B. 69, at p. 76.

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March 16. LORD ALVERSTONE C.J. I share the view of the learned judges in the Divisional Court that this question is one of considerable difficulty. I am not prepared to reverse their decision, and, upon the best consideration that I can give to the matter, I think that I should have arrived independently at the same conclusion. The question is difficult because words are used in the Land Drainage Act, 1847, which are not very definite, and upon the construction of which this case entirely depends. It is important to consider the broad purview of this legislation. The preamble to the Act recites that "it is expedient that provision should be made for promoting the drainage of lands in England and Wales"; the object of the Act was, therefore, land improvement and land drainage. At the date of the Act the rights of mill-owners were perfectly well known, and actions in respect of such rights were not infrequent; one would therefore expect, as Channell J. suggests, to find on the face of this Act a clear indication of the intention of the Legislature to impose upon a lower riparian owner the new liability of deepening the channel in such cases as the present. It is not clear that an action will lie in respect of the mere silting up of the channel lower down the stream, and reliance cannot be placed upon the principle which underlies actions for penning back water, for such actions are nearly always cases where a positive act of penning back has been committed by the defendant, as by putting a dam across the stream or otherwise obstructing it. I agree with the view of Channell J. that s. 14 imposes a new liability, and the words "want of co-operation" shew that the Legislature intended to deal with cases where two or more riparian owners or occupiers were concerned, or where joint action was necessary to cause the water to flow away, and the interests of more than one person were affected. If this case were one in which the justices had found that the ordinary drainage of the land was impeded—for example, that the side drains from the mill tail had become choked—different considerations might apply; but they have not so found; their only finding is that the effect of the silt was to pen back the water on to the mill wheel, thereby submerging it to a depth sufficient to reduce its power. I am unable to see that Channell J. was

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wrong in thinking that the special remedy given by the Act did not apply to cases of mere tailing up, where there is no question of injury, which might have been prevented, being occasioned to the land itself. I do not decide the question whether the section applies only to land in an agricultural condition, though personally I incline to think that its application is not confined to such land. This is not a case where the mill-owner desires permission to clean out the channel in another occupier's land; it is a case where the mill-owner wishes, for his own benefit, to impose the cost of that cleansing upon another riparian owner, and I think it would require very clear and special words in a statute to impose such a burden. Upon the evidence it is clear that the appellant was not guilty of committing any wrong which would give rise to a cause of action against him; the right of the mill-owner must therefore depend entirely upon the statute, which, in my view, does not justify us in placing the cost of scouring the stream for the benefit of the mill-owner on some one else. I think that this appeal must be dismissed.

FARWELL L.J. I agree, but I think the case one of considerable difficulty. It is not necessary for us to define with exactness the meaning of the word "land" in s. 14; it is sufficient to say that it is not there used in its widest possible sense, and that in its particular sense it does not apply to the present case. Using the language of Channell J., "I have come to the conclusion, though not without some doubt, that the expression 'injury . . . . to any other land' in s. 14 does not cover the damage to a mill-owner which was complained of in the present case."

KENNEDY L.J. I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitors for Finch: *Biggs-Roche, Sawyer & Co., for J. C. Buckwell & Co., Brighton.*

Solicitors for Bannister: *Mander & Sons, for Hardwick & Blaber, Brighton.*

W. J. B.

THE LONDON COUNTY COUNCIL *v.* SPINK & SON, LIMITED.

1908
May 12.

Local Government—Metropolis—High Building—Deposit of Plans—"Before or at the same time" as the Building Notice—Provision directory only—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 145—*London Building Acts* (*Amendment*) *Act*, 1905 (5 *Edw.* 7, *c. ccix.*), *ss.* 7, 22.

The provision in s. 7 of the London Building Acts (Amendment) Act, 1905 (which deals with means of escape in case of fire in certain new buildings), requiring the deposit of plans "before or at the same time" as the building notice, is directory only, and not a condition precedent either to the jurisdiction of the county council to approve or reject the plans or to the right of the building owner to appeal under s. 22 of the Act to the tribunal of appeal from the rejection of the plans.

So where a building owner, having given a building notice in the case of a high building, subsequently deposited plans shewing the means of escape in case of fire, which were rejected by the county council:—

Held, that he was not precluded from appealing to the tribunal of appeal from the rejection by reason of his failure to deposit the plans before or at the same time as the building notice.

Case stated by the tribunal of appeal under the London Building Acts.

Messrs. Spink & Son, Limited, appealed to the tribunal of appeal against an alleged refusal by the London County Council to approve certain plans deposited with them and intended to shew, in accordance with the provisions of the London Building Acts (Amendment) Act, 1905, the means of escape in case of fire from a certain new building erected by Messrs. Spink & Son in the city of London.

A preliminary objection was taken to the hearing of the appeal, on behalf of the London County Council, that no appeal lay because the plans of the proposed building had not been deposited before or at the same time as the service of the building notice by Messrs. Spink & Son as required by s. 7, sub-s. 1, of the London Building Acts (Amendment) Act, 1905. (1)

(1) Sect. 145 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), provides that two clear days before a building is begun the builder shall serve on the district surveyor a building notice respecting the building.

By the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 7 (the marginal note of

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It was proved that the building in question was a high building within the meaning of the Act, and that a building notice under s. 145 of the London Building Act, 1894, had been duly served on the district surveyor on July 4, 1906. This building notice, however, did not shew the building to be a high building within the meaning of the Act of 1905. On December 28, 1906, a notice and plans shewing the proposed means of escape in case of fire from the building were deposited at the county hall on behalf of Messrs. Spink & Son, and on January 18, 1907, the London County Council refused to sanction them, and Messrs. Spink & Son accordingly appealed to the tribunal of appeal.

It was contended in support of the preliminary objection that it was a condition precedent to the approval or refusal by the county council of any plans shewing the proposed means of escape in case of fire, and to the right of appeal to the tribunal of appeal, that such plans should be deposited before or at the same time that the building notice under s. 145 of the Act of 1894 was served on the district surveyor. The tribunal of appeal decided against the preliminary objection, holding that if it were upheld it would render the Act unworkable and abortive, since if a building owner were late in depositing the plans or

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which section is "Protection against fire in certain new buildings"), sub-s. 1: "Every new building . . . which is (*a*) a high building or (*b*) a building in which sleeping accommodation is provided for more than twenty persons . . . shall be provided in accordance with plans approved by the Council or (in the event of an appeal) the tribunal of appeal with all such means of escape therefrom in case of fire as can be reasonably required under the circumstances of the case.

"The owner of the building shall before or at the same time that the building notice under s. 145 . . . . of the Act of 1894 in respect of such building is served on the district surveyor deposit . . . . at the county hall a notice stating the like matters and particulars as are required by the last-mentioned section to be stated in a building notice thereunder together with a copy . . . . of the plans prepared for such new building showing so far as may be necessary for the purposes of this Act the means of escape proposed to be provided . . . ."

By s. 22: "At any time within two months after (*a*) the refusal . . . . by the Council of their approval of any plans deposited pursuant to the section of this Act the marginal note whereof is 'Protection against fire in certain new buildings' . . . . the owner of the building . . . . may if he thinks fit appeal to the tribunal of appeal."

had to alter the plans after the deposit he would be obliged to pull down the building and then deposit fresh plans. They accordingly heard, and in the result allowed, the appeal, but stated this case for the opinion of the Court.

Avory, K.C. (*W. A. Robertson* with him), for the London County Council. The plans were deposited too late, and therefore the county council had no jurisdiction to deal with them. The provisions of s. 7 of the Act of 1905 are imperative that the plans must be deposited "before or at the same time" as the building notice. The county council cannot approve the plans after the building is erected, and the Court will not compel them to do so: *Reg.* v. *London County Council.* (1)

At any rate the deposit of the plans with the building notice is a condition precedent to the right to appeal to the tribunal of appeal. Sect. 22, which gives the appeal, only gives it in case of the refusal by the council of their approval "of any plans deposited pursuant to the section." That must mean that the plans are deposited in accordance with the provisions of s. 7, i.e., before or at the same time as the building notice under s. 145 of the Act of 1894.

Daldy, for Messrs. Spink & Son, was not called upon to argue.

CHANNELL J. In this case I am clearly of opinion that the provisions of s. 7 of the Act of 1905, so far as regards the time of depositing the plans, are only directory, and not a condition precedent to the duty of the county council or of the tribunal of appeal to approve or reject the plans. It is putting a wholly irrational and impossible construction on the section to say that it is essential that the deposit of the plans and the giving of the building notice must take place at the same time, because, as the tribunal of appeal have pointed out in the case, it seems to render the Act unworkable. If a man does not deposit the plans at the time that he gives the building notice, either from forgetfulness, which can be repaired next day, or because he has miscalculated the height of the building and thought that it was just under fifty feet when it was actually just over

(1) (1897) 76 L. T. 472.

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that height, or because he subsequently alters his plans, or for any reason of that sort, the argument is that, because he has not deposited his plans when he gave his building notice, at no time afterwards can he ever do it. He must, it is said, deposit plans, and such plans as are sufficient to enable the county council, and ultimately the tribunal of appeal if it goes to them, to form their judgment as to the sufficiency of the means of escape from fire before or at the same time that he gives the building notice, and the deposit of plans at that time is therefore an essential condition both to the jurisdiction of the county council and to his right to appeal to the tribunal of appeal. To uphold that contention would make the thing unworkable, in my opinion, and, therefore, although I think it is a thing that ought to be done, and if not done the person who omits to do it may be subject to a penalty under the 24th section, and may also, of course, be put to very considerably more expense in doing what may be ultimately adjudged to be necessary for providing means of escape in the event of fire by reason of his not getting the approval of the county council at the earliest period, yet I think the requirements of the section, so far as time is concerned, are directory only, and not a condition. That means that when he finds out that his building will come within the section, which is not necessarily known to him at the time he gives his building notice, he must deposit proper plans, and if he does deposit plans, I do not think it is a fatal objection that they were not presented at the same time as the building notice. I think the county council have got to deal with that as it is, and to give their approval or disapproval of the plans so presented.

That being so, is there an appeal from the decision of the county council to the tribunal of appeal? One knows as a matter of history that the decisions of the superintending architect of the Metropolitan Board of Works as to the building line in the first instance were final; that caused grievances, and this special tribunal of appeal was constituted so as to give an opportunity of reviewing the decision of the architect. What reason is there why the appeal given by the subsequent Act to the same tribunal against the decision of the local authority should not be given in cases such as I am describing, where the

decision of the county council is given upon plans not deposited on the very day with the building notice, but deposited subsequently? I see none. Sect. 22 says that the appeal is to be from the refusal of the approval of plans "deposited pursuant to the section." If we are right in saying that the provisions of s. 7, so far as time is concerned, are directory only, then, although the plans are presented after time, they are still presented "pursuant to the section," because I am assuming that they are sufficient to enable the county council or the tribunal to form its judgment as to whether the means of escape from fire are adequate. If the plans are insufficient to shew this, then they are not "pursuant to the section," but if they are sufficient and proper plans, but are deposited a day or two late, then, if we are right in saying the provision in s. 7 is directory only, they still are deposited "pursuant to the section," and therefore the appeal lies.

I am of opinion that this tribunal of appeal took the proper view of this section and rightly entertained the appeal, and that upon the case stated our decision should be for the respondents.

SUTTON J. concurred.

Appeal dismissed.

Solicitor for appellants: *E. Tanner.*
Solicitor for respondents: *Stanley J. Attenborough.*

A. P. P. K.

1908
May 22.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ELLIOTT AND OTHERS.

Criminal Appeal—Order for Restitution of Stolen Property—Appeal by Person against whom Order made—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 6, *sub-s.* 2; *Criminal Appeal Rules*, 1908, *r.* 9.

Where upon a conviction an order for the restitution of stolen property has been made by the Court of trial, although, upon an appeal by the convicted person to the Court of Criminal Appeal, the person against whom the order of restitution has been made has, in the event of that Court proposing of its own motion to annul or vary that order, a right to be heard under r. 9 of the Criminal Appeal Rules, 1908, he has no right himself to initiate an appeal against the order.

APPEAL to the Court of Criminal Appeal against a restitution order.

The defendants were convicted at the North London Sessions on a charge of breaking into the shop of Messrs. Davison, jewellers, of 102, Southampton Row, and stealing therefrom a large quantity of jewellery. There being evidence before the Court of quarter sessions that four ingots of gold and ten Bank of England notes of 5*l.* each, then in possession of the police, were property into which, or for which, part of the goods stolen had been converted or exchanged, the chairman made an order for the restitution of the said ingots and bank notes to the prosecutors, Messrs. Davison. The defendants having appealed to the Court of Criminal Appeal against the conviction, the Court dismissed the appeal. Thereupon an application was made on behalf of Messrs. Dettmer & Co., who had purchased the ingots from the defendants, for an annulment or variation of the restitution order upon the ground that, if the ingots were in fact the stolen jewellery melted down, the bank notes were the very notes which Messrs. Dettmer & Co. had paid to the defendants as the price of the ingots so purchased, and that Messrs. Davison could not be entitled to have both the ingots and the notes.

Merlin, for the applicants. The Court has jurisdiction to vary the order under s. 6, sub-s. 2, of the Criminal Appeal Act, 1907,

which provides that "The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed." Messrs. Dettmer, as the persons against whom the order was made, are entitled to appeal against the order under r. 9 of the Criminal Appeal Rules, 1908. By that rule, "Where upon the trial of a person entitled to appeal under the Act against his conviction an order of restitution of any property to any person has been made by the judge of the Court of trial, the person in whose favour or against whom the order of restitution has been made . . . . shall, on the final hearing by the Court of Appeal of an appeal against the conviction on which such order of restitution was made, be entitled to be heard by the Court of Appeal before any order under the provisions of s. 6, sub-s. 2, of the Act annulling or varying such order of restitution is made."

C. L. Attenborough, for the prosecutors. The parties against whom a restitution order is made have no right of appeal against it. When the Court themselves propose to annul or vary the order the persons in whose favour the order was made are entitled under r. 9 to be heard in opposition to that proposal, and the persons against whom it was made are entitled to be heard by way of answer in support of it. But that is the limit of the right which the rule confers. And here the Court have not proposed to vary the order.

The judgment of the Court (Lord Alverstone C.J., Lawrance and Ridley JJ.) was delivered by

LORD ALVERSTONE C.J. This application is misconceived. It was not intended to give any right of appeal to a person against whom an order for restitution has been made. The only right of appeal conferred by the Criminal Appeal Act is that given by s. 3, which allows a person convicted on indictment to appeal against the conviction. By s. 6, sub-s. 2, the Court of Criminal Appeal is given power, as incidental to the hearing of such an appeal, to annul or vary a restitution order made by the Court of trial. But neither the Act nor the rules give any right to the person against whom such an order has been made to set

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the Court in motion by a substantive application for that purpose. All that r. 9 says is that the person in whose favour or against whom the restitution order has been made shall be entitled to be heard before the Court make any order annulling or varying the order for restitution. Except in the event of the Court proposing to annul or vary the restitution order, the condition upon which alone the person against whom the order was made is entitled to be heard does not arise.

LAWRANCE and RIDLEY JJ. concurred.

Application refused.

Solicitor for applicants: *E. J. De Buriatte.*

Solicitor for Messrs. Davison: *Stanley J. Attenborough.*

J. F. C.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* DYSON.

Criminal Appeal—Conviction involving "no substantial Miscarriage of Justice," Meaning of—Power of Court to find Facts—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

On the trial of an indictment for manslaughter there was evidence that the prisoner had inflicted injuries upon the deceased more than a year and a day before the date of the death, and also certain further injuries within that period which tended to accelerate the death. The judge directed the jury that they might find the prisoner guilty even if they thought that the death was wholly caused by the earlier injuries. The jury convicted the prisoner.

By s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, "The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Upon an appeal against the conviction on the ground of misdirection:—

Held, that, although upon a proper direction the jury would probably have found that the later injuries accelerated the death, as it was not certain that they would have done so, and as the Court were not entitled under the above section to substitute themselves for the jury and find the facts necessary for conviction, they could not say that there had been no substantial miscarriage of justice, so as to entitle them to dismiss the appeal upon that ground.

APPEAL to the Court of Criminal Appeal from a conviction at the Manchester Assizes.

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The prisoner was indicted for the manslaughter of his infant child. According to the evidence, on November 13, 1906, the prisoner seized the child, then a baby three months old, by the legs and flung it down and beat it into a condition of unconsciousness. Shortly afterwards its skull was found to be fractured. For this assault he was prosecuted at the Salford Borough Police Court under the Prevention of Cruelty to Children Act, 1904, and sentenced to four months' imprisonment. On December 29, 1907, the prisoner was heard to beat the child, and the following morning its face and head were found to be severely bruised. For this assault he was also prosecuted at the police court on January 18, 1908, and sentenced to six months' imprisonment. On February 17, 1908, the child was admitted into the hospital suffering from traumatic meningitis, from which it died on March 5, 1908. At the time of its admission into the hospital all external marks of the violence of the previous December 29 had disappeared. The medical evidence went to shew that the fracture of the skull in so young a child would necessarily cause destruction of the brain tissue, and eventually death, though the child might possibly live with such a fracture for some few years; that the fracture was the main cause of the child's death; but that the subsequent acts of violence, if they took place, would accelerate the death. It was contended on behalf of the prisoner that the sole cause of death was the original fracture of the skull. For the Crown it was contended that the death was accelerated by the injury inflicted by the prisoner in December, 1907. The judge, in the course of the summing-up, directed the jury that if they were satisfied that the prisoner either caused the child's death by his violence on November 13, 1906, or accelerated it by his subsequent violence on December 29, 1907, they must find him guilty. The jury having found the prisoner guilty, he appealed against the conviction to the Court of Criminal Appeal.

Cremlyn, for the prisoner. The judge misdirected the jury in leading them to suppose that they could convict the prisoner if they thought the death was not accelerated by the later acts of violence, but was wholly caused by the injury inflicted

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in November, 1906. Their verdict was a general verdict, and it may be that they intended to negative the acceleration of the death by the more recent assault. It is clear that a person cannot be held guilty of manslaughter where the deceased did not die within a year and a day after the cause of death. Here the child did not die till nearly sixteen months after the fracture of its skull.

Shepherd Little, for the prosecution. It is not disputed that there was a misdirection. But the conviction, being bad upon a purely technical point, did not involve any substantial injustice; and the Court are consequently empowered to dismiss the appeal by virtue of the proviso in s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which provides that "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Cur. adv. vult.

May 25. The judgment of the Court (Lord Alverstone C.J., Lawrance and Ridley JJ.) was delivered by

LORD ALVERSTONE C.J. The prisoner was indicted for the manslaughter of his child, who died on March 5, 1908. There was evidence that the prisoner had inflicted injuries upon the child in November, 1906, and certain further injuries in December, 1907. The jury convicted the prisoner, who appeals against that conviction upon the ground that the judge misdirected the jury in that he left it to them to find the prisoner guilty if they considered the death to have been caused by the injuries inflicted in 1906. That was clearly not a proper direction, for, whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause. Under these circumstances, there having been a misdirection, the question arises whether the Court can nevertheless dismiss the appeal under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907,

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upon the ground that no substantial miscarriage of justice has actually occurred by reason of the conviction. The proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he inflicted in December, 1907. For if he did, the fact that the child was already suffering from meningitis, from which it would in any event have died before long, would afford no answer to the charge of causing its death: *Rex* v. *Martin*. (1) And if that question had been left to the jury, they would in all probability have found the prisoner guilty on that ground; indeed it was the only ground upon which counsel for the prosecution invited them to convict. But it is one thing to say that the jury on a proper direction would probably have so convicted; it is another to say positively that there has been no substantial miscarriage of justice. We feel that we cannot act upon the proviso in sub-s. 1 of s. 4, for it is in our judgment plain that we cannot substitute ourselves for the jury and find the facts which are necessary to support the conviction. The proviso is intended to apply to a case in which the evidence is such that the jury must have found the prisoner guilty if they had been properly directed. It does not apply where the evidence leaves it in doubt whether they would have so found; and here the medical evidence established that there were no external marks of recent injury, a fact which might have induced the jury to find that the assault committed in December, 1907, did not accelerate the death. The case of *Makin* v. *Attorney-General for New South Wales* (2) is directly in point. In a Criminal Law Amendment Act of the Colony it was provided, with reference to appeals upon a case stated, that "no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated unless for some substantial wrong or other miscarriage of justice." And the Privy Council held that that provision did not transfer from the jury to the Court the determination of the question whether the evidence established the guilt of the accused. "Their Lordships," they said, "do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the

(1) (1832) 5 C. & P. 128.

(2) [1894] A. C. 57.

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guilt or innocence of the accused the jury have . . . . been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them." That passage indicates the principle on which we ought to proceed here. It is to be regretted that the Legislature when passing the Criminal Appeal Act did not empower the Court to order a new trial, for the present is a case in which it is eminently desirable that such a power should exist. But they did not think fit to do so, and we have no choice but to allow the appeal.

Conviction quashed.

Solicitor for prisoner: *H. Gilmour Jones, Salford.*

Solicitors for prosecution: *Crofton, Craven & Worthington, Manchester.*

J. F. C.

K. B. D. 1907 *Oct.* 22.

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

CATT *v.* WOOD.

Friendly Society—Dispute—Arbitration under Rules—Order to pay Costs—Jurisdiction—Ultra vires—Friendly Societies Act, 1896 (59 & 60 *Vict.* c. 25), *s.* 68.

By s. 68, sub-s. 1, of the Friendly Societies Act, 1896, "Every dispute between (*a*) a member or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

A registered friendly society made certain rules, one of which was that the decision of every arbitration and appeal committee should be binding immediately after it had been given by the committee, unless otherwise ordered, and any member, court, or district refusing to comply should be suspended from the order; another rule provided that the arbitration committee might order either party to pay

costs. The plaintiff and his son were both members of the society, and the plaintiff's son, having become a lunatic, was removed to an asylum, where the plaintiff paid for his maintenance. The plaintiff, acting in form on behalf of his son, but in fact with the object of recouping himself the cost of his son's maintenance, claimed his son's sick pay, which, after the dispute had been heard by the domestic tribunals under the rules, was awarded from a certain date. The plaintiff claimed that it ought to commence from an earlier date, and this dispute also was referred under the rules to an arbitration committee of the society, which decided against the plaintiff and ordered him to pay the costs. The plaintiff declined to pay the costs, and, having been suspended under the above rule, brought an action for an injunction to restrain the society from suspending him and for damages for wrongful exclusion from the society :—

Held, that the rule providing for suspension was not ultra vires as being in contravention of s. 68 of the Friendly Societies Act, 1896, because, even assuming that exclusion under that rule was a proceeding to enforce compliance with the decision of the arbitration committee, the provisions of s. 68 did not forbid the enforcement of the decisions of domestic tribunals by other means than legal process, but merely prevented applications for enforcement from being made to any Court of law other than a county court.

Held, further, that the plaintiff's claim against the society for the sick pay was brought by him in his capacity of a member, against whom an order for costs could properly be made ; and that, even if the claim was in strictness a claim on behalf of his son, the plaintiff was a "party" to the proceedings before the arbitration committee within the meaning of the rules, and was, as such, liable to have an order for costs made against him.

APPEAL of the plaintiff from the judgment of Lord Coleridge J. at the trial of the action without a jury. The following statement of the facts is taken from the written judgment of Vaughan Williams L.J. in the Court of Appeal.

The plaintiff's claim in this action is against the defendants as trustees of the Ancient Order of Foresters' Friendly Society, a society registered under the Friendly Societies Act, 1896, (1.) for an injunction to restrain the defendants and the Ancient Order of Foresters' Friendly Society, its members and officers, from excluding the plaintiff from the meetings and benefits of the society and from refusing to receive the plaintiff's subscriptions; (2.) damages for wrongful exclusion from the said society ; (3.) costs. The plaintiff, Mr. Richard Catt, and his son, Mr. George Blackburn Catt, are both members of the Court Hunterian, No. 2987, branch of the

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Ancient Order of Foresters. On May 18, 1903, the plaintiff's son was sent under a magistrate's order to the borough lunatic asylum, whence he was transferred to the county asylum, and remained there until August 29, 1903, when he came out, and he went in again on November 10, 1904, and remained there until September 19, 1905. To prevent his son from being deprived of sick pay under s. 3 of General Law 42, on account of becoming "the inmate of a workhouse or workhouse infirmary, or lunatic asylum, at the charge of any public board or authority," the plaintiff, his father, paid to the asylum the amount due for his son's maintenance there, which exceeded the amount of sick pay payable to the son under the rules of the society. On May 21, 1903, the plaintiff applied to the secretary of the court on behalf of his son for his sick pay; this the secretary refused on the ground that the son was not entitled to it under the rules. Thereupon the plaintiff, acting under the provisions of General Law 67, applied for arbitration on behalf of his son on the question whether or not sick pay was due. Sect. 2, sub-s. 3, of General Law 67, which is the section defining the functions of the court arbitration committee, runs thus: "The functions of this committee shall be to hear and decide, according to the rules and the general laws, upon the following cases:—. . . (3.) Any appeal against a fine inflicted by the officers of the court, or stoppage of sick pay by the officers, or against any act of such officers done on their own authority and not under a resolution of the court. (*a*) Every appeal by a member or past member of a court, or person claiming through a member or under the rules, against any resolution, decision, or act of a court done as a body, shall be made to the arbitration committee of the district pursuant to General Law 68, if the court be in a district; or to the arbitration committee of the nearest district, if the court be out of district." General Law 68 deals with appeals from that first committee, and is headed "Charges and Appeals; District Arbitrations." Sect. 1 provides that "every district shall appoint, at its annual meeting, an arbitration and appeal committee," and s. 2 provides that "the functions of this committee shall be to hear and decide, according to the rules and general laws, upon the following cases:—(1.) Any dispute, charges

or complaint in respect of some matter or thing only connected with the order, between a member, or past member, or officer, or court, against another member, past member, officer, or court, of the same district or court out of district; or between a member, or past member, or person claiming through such member, or under the rules, and the district and its officers. . . . . (3.) Any appeal by a member, or past member, or court, against the decision or act of a court or court committee of the same district or court out of district; any appeal or claim by any person on behalf of a member, or past member, or person entitled, against a court or the district officers or a court out of district for the withholding of a member's funeral allowance; or any appeal against any fine or penalty, or any act of the district officer, done on their own authority, and not under a resolution of a district meeting." The material words of this last sub-section are, "claim by any person on behalf of a member or past member."

On June 20, 1903, the plaintiff sent to the secretary certificates from the medical officer of the borough and county asylums as to the detention and condition of his son. On June 22, 1903, Mr. Beerling, the secretary of Court Hunterian, wrote to the plaintiff, "Having regard to the doctors' certificates from the Borough Asylum, Canterbury, and the Kent County Asylum, Chartham, in reference to the state of your son's health, I beg to inform you that in accordance with General Law 42, s. 3, I cannot put him on the funds of this court." The plaintiff then gave formal notice of his intention to claim, on behalf of his son, George Blackburn Catt, a member of the above-mentioned court of the Ancient Order of Foresters, his sick pay from May 18, 1903, at 14*s.* per week, being the date of his admission into the Borough Asylum at Canterbury, and on July 21, 1903, the court arbitration committee, acting under General Law 67, decided (1.) that the son, G. B. Catt, was not chargeable to any public board or authority, and (2.) that his sick pay should commence on June 20, that is, the date when the medical certificates were sent to the secretary. This decision was affirmed on appeal by the district arbitration committee (acting under General Law 68) on September 22,

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1903, who ordered Beerling, the secretary, to pay the expenses of the committee, and on a final appeal by the final arbitrators, acting under General Law 69, on November 19, 1903. The plaintiff, in accordance with these decisions, applied to the secretary for sick pay, and contended that his son was entitled to sick pay from May 18, when his son was sent to the asylum. The secretary refused to give sick pay for the period between May 18 and June 20. The plaintiff then claimed arbitration, and the question of the date from which the son was entitled to sick pay came before the arbitration committee, and the decision on March 8, 1904, ran as follows: "Resolved: that the question of payment of sick pay claimed by Brother Catt for the period May 18 to June 20, 1903, was heard and decided by the court arbitration committee of July 21, 1903, which decision was subsequently upheld by the district arbitration committee and final arbitrators, therefore this appeal cannot be sustained. That Brother Catt pay the cost of this committee (2*l.*) and 17*s.* 6*d.* each for the two members and one witness attending on behalf of the court." The decision was headed "Richard Catt, member of the court 2987, versus the court 2987," but was intituled "In the matter of five weeks' sick pay, claimed on behalf of his son, Brother G. B. Catt, of court 2987, for the period May 18, 1903, to June 20, 1903, both dates inclusive, at 14*s.* per week." The entry in the rough minute-book, 1904, of this decision, on March 8, 1904, spoke of the claim being by Richard Catt on behalf of his son, Brother G. B. Catt, and said, "Brother R. Catt represented his son, and Mr. Beerling appeared for the court"; but the resolution concluded with the words that Brother R. Catt pay the costs of this committee, which shews that Brother R. Catt was intended to be the person liable for these costs; this, however, did not appear in the copy served on Brother R. Catt, and was only brought to his knowledge by the production of the minute-book at the trial. The plaintiff, although several applications were made, did not pay these costs, on the ground that he was only claiming the sick pay and the arbitration on behalf of his son, who was a member of the society, and not on his own behalf, and that the arbitration committee had no jurisdiction to order him to pay costs. As the plaintiff did not pay the costs,

notice of suspension under rule 70, s. 1 (*a*), of the general laws of the society was given to him. (1) This action was then brought.

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A. E. Hughes, for the plaintiff.

Lush, K.C., and *John Leslie*, for the defendants.

1907. Oct. 22. LORD COLERIDGE J. In this case Richard Catt sues the trustees of the Foresters' Friendly Society on the ground that they have improperly excluded him from the benefits of the society and refused to receive his subscription, and he claims, amongst other things, an injunction to restrain the society from so excluding him. It was at first urged on behalf of the defendants that the jurisdiction of this Court was ousted. I do not think it is, having regard to the decisions of *Palliser* v. *Dale* (2) and *Andrews* v. *Mitchell* (3), which hold that where a person originally a member has been expelled, or suspended, which is practically the same thing, he cannot claim as a member; and it cannot be said that for that reason alone the jurisdiction of this Court is ousted. It was then suggested that rule 70 (1.) (*a*) was ultra vires on the ground that it was in conflict with the provisions of s. 68 of the Friendly Societies Act, 1896. I do not think that that is a good objection. The section certainly provides that disputes are to be decided in manner directed by the rules of the society or branch, and that the decision so given shall be binding and conclusive upon all parties to that appeal and shall not be removable into any Court of law or restrainable by injunction; and it further says that the application for the enforcement of the decision may be made to the county court. I agree that, if this was a proceeding on the part of the society for the enforcement of payment of a sum due against a member in consequence of a dispute, and if the society brought the dispute into the High Court, it would probably be true to say that the only mode of enforcement had been provided by the statute, and that, notwithstanding any rule of the society, the

(1) By rule 70 (1.) (*a*), "The decision of every arbitration and appeal committee shall be binding immediately after it has been given by the committee, unless otherwise ordered; and any member, court, or district refusing to comply shall be suspended from the Order."

(2) [1897] 1 Q. B. 257.

(3) [1905] A. C. 78.

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only tribunal in which the award could be enforced was the county court. But that is not this case. The question here is whether rule 70 (1.) (*a*) applies to the plaintiff, who conducted certain proceedings on behalf, undoubtedly, of his son, who was confined in a lunatic asylum. It is apparently a rule of the society that, if one of its members is in receipt of parish relief, sick pay is not payable on the part of the society. I ask myself rather what is the substance than what is the form of the proceedings that took place. In form I doubt not that the proceeding was instituted by the plaintiff on behalf of his son, and I was much impressed by the argument that the case came within rule 68 (2.). That rule provides that "the functions of this committee shall be to hear and decide according to the rules and general laws upon the following cases," and sub-s. 3 brings in "any appeal by a member or past member or court against the decision or act of a court or court committee of the same district or court out of district, any appeal or claim by any person on behalf of a member or past member or person entitled," and so forth. It was urged that the plaintiff came under the category of a person claiming on behalf of a member, and, therefore, that he could not be dealt with in any way by the arbitration committee before whom he appeared. It was said that he could not be dealt with in any way qua member, and if that is so it is clear that under rule 70 (1.) (*a*), which deals with a member who refuses to comply with an order made upon him qua member, an order on the plaintiff to pay costs would be an order which he would be entitled to disregard. But though it is true that in form the proceedings are taken by the plaintiff on behalf of his son, I look behind the form to see what is the substance. The substance is that the plaintiff, having paid this money which he was not bound to pay, was claiming that the sick pay should be payable to him and not to his son; therefore, whatever the form may be, in substance the application or demand was made by him against the society that the society should pay him these moneys. That being so, I have to decide whether the plaintiff is a party within the meaning of rule 68 (4.), which provides that the committee may charge either party with the expenses of the committee. This is a case in which the dispute arises over the

expenses of the committee, and I have to decide whether the plaintiff is merely a person acting on behalf of a member and not a member in the literal sense of being a party to the proceedings under rule 68 (4.). If I preferred form to substance, I should probably be inclined to hold that the plaintiff came strictly under the definition of a person claiming on behalf of a member; but I am assured that he is a party to the dispute or proceedings and a member, and therefore, being a party who is also a member, he seems to me to come under the description in rule 70 (1.). If he does, the decision of the arbitration committee is against him; he has refused to comply with it, and the rule and section authorizing the arbitration and appeal committees to suspend any member refusing to comply with the order which they have made comes into force. The plaintiff has refused to comply with the order, and therefore, if my view of the facts be correct, the defendants were justified in their action. Under these circumstances I think that the action fails, and there must be judgment for the defendants.

The plaintiff appealed.

A. E. Hughes, for the plaintiff. The order of the arbitration committee that the plaintiff should pay the costs of the arbitration proceedings was made without jurisdiction. Such a power only arises where the party to the arbitration is making a claim as a member in his own right, and the facts of the present case shew that the plaintiff was not claiming qua member, but was making a claim on behalf of his son. If the plaintiff was claiming on behalf of his son, it is immaterial that he was himself a member of the society; the power to order payment of costs would in such a case be no greater than if the person claiming on behalf of the son had been a stranger and not a member of the society at all. Under rule 70 (1.) (*a*) the defendants have purported to exclude or expel the plaintiff, but that rule only attaches in the case of a person who is before the arbitration tribunal in the character of a member in the strict sense of that word. That rule involves suspension from membership of the order, which under other rules (if the costs

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were not paid) would crystallize into expulsion; it is not confined to suspension from the benefits of the court. There is no finding of fact by the judge that the plaintiff appeared before the arbitration tribunal in the character of a member. A long chain of authorities shews conclusively that to bring a dispute within the arbitration clause of the Friendly Societies Acts the dispute must be one which arises between the society and a party claiming as a member of the society. [He cited on this point *Morrison* v. *Glover* (1); *Prentice* v. *London* (2); *Mulkern* v. *Lord* (3); *Municipal Building Society* v. *Kent* (4); *Western Suburban Building Society* v. *Martin* (5); *Andrews* v. *Mitchell.* (6)]

Secondly, rule 70 (1.) (*a*) and the order made under it were alike ultra vires as being in contravention of s. 68 of the Friendly Societies Act, 1896. The power to make a rule under that section is confined to cases of non-payment of fines, forfeitures, and subscriptions as mentioned in Sched. I. (2.) of the Act, and non-payment of costs does not fall within the language there used. Further, the question as to payment of the son's sick pay was a dispute within the meaning of s. 68, and the only remedy under that section was by an application to the county court, for where a statute provides a special remedy, that is the only remedy which can be pursued: *Barraclough* v. *Brown* (7); *Payne* v. *Cork Co.* (8) Even assuming that rule 70 (1.) (*a*) is not in itself ultra vires, it cannot be used to enforce the decision of the arbitration tribunal; such a course would be in contravention of the special machinery for enforcement contained in s. 68.

Lush, K.C., and *John Leslie*, for the defendants. First, rule 70 (1.) (*a*) is not ultra vires; it in no way contravenes the provisions of s. 68 of the Friendly Societies Act, 1896. That section forbids any application to a Court of law, except a county court, for the enforcement of the decision of an arbitration tribunal; but the society is not making an application for the enforcement of the order for payment of costs in the present

(1) (1849) 4 Ex. 430.
(2) (1875) L. R. 10 C. P. 679.
(3) (1879) 4 App. Cas. 182.
(4) (1884) 9 App. Cas. 260.
(5) (1886) 17 Q. B. D. 609.
(6) [1905] A. C. 78.
(7) [1897] A. C. 615.
(8) [1900] 1 Ch. 308.

case; in effect it is the plaintiff himself who is applying to a Court of law to prevent the necessary consequences of his declining to comply with the decision. No doubt where a specific remedy is given by a statute which itself creates a new obligation, that is the only legal remedy which can be pursued: *Pasmore* v. *Oswaldtwistle Urban Council* (1); but that does not prevent the parties from providing consensually for another remedy than that prescribed by the Act. Here the parties have agreed that the settlement of disputes shall be effected by a domestic tribunal, and the mere fact that under the rules of the society disobedience to or non-compliance with an order may be punished with suspension affords no justification for the contention that the defendants are enforcing the decision of the arbitration committee in a way not authorized by s. 68.

Secondly, on the facts and on the true construction of the correspondence the plaintiff was claiming the money on his own behalf to recoup himself for the money paid by him for his son's maintenance in the asylum; he was acting throughout qua member, and his position all along was that, though the sick pay was due to his son, he was claiming it himself as a member of the society. Rule 70 (1.) (*a*) made the decision of the arbitration tribunal binding on the plaintiff as a member and made the plaintiff liable to suspension for non-compliance with it; as long as that decision stands, the plaintiff cannot get rid of it by an application to a Court of law: *Bache* v. *Billingham*. (2) *Palliser* v. *Dale* (3) may at first sight appear to be against the defendants' contention, but that case was merely a decision that s. 68 does not extend to disputes as to the title of a person to be a member of a society and is clearly distinguishable on the facts from the present case.

A. E. Hughes in reply.

April 10. VAUGHAN WILLIAMS L.J. read the following judgment. [After stating the facts substantially as they are above set out, the Lord Justice proceeded:—] The learned judge in his judgment, after having decided, on the authority of *Palliser* v. *Dale* (3) and *Andrews* v. *Mitchell* (4), against the defendants on a

(1) [1898] A. C. 387, at p. 394.
(2) [1894] 1 Q. B. 107.
(3) [1897] 1 Q. B. 257.
(4) [1905] A. C. 78.

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point made by them, that the jurisdiction of the High Court was ousted by the provisions of the Friendly Societies Act, 1896, goes on to deal with a point made on behalf of the plaintiff that General Law 70, s. 1 (*a*), was ultra vires on the ground that it was in conflict with s. 68 of the Friendly Societies Act, 1896, and decides that point against the plaintiff. [His Lordship read the section.] And in particular the learned judge points out that the section provides with regard to disputes that they shall be decided in the manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive upon all parties to that appeal, and shall not be removed into any Court of law for the purpose of restraining it by injunction, and it further provides that the application for enforcement thereof may be made in the county court. The learned judge then goes on: "I agree that, if this was a proceeding on the part of the society for the enforcement of payment of a sum due against a member in consequence of a dispute, and if the society brought the dispute into the High Court, it would probably be true to say that the only mode of enforcement had been provided by the statute, and that, notwithstanding any rule of the society, the only tribunal in which the award could be enforced was the county court. But that is not this case. The question here is whether rule 70 (1.) (*a*) applies to the plaintiff, who conducted certain proceedings on behalf, undoubtedly, of his son, who was confined in a lunatic asylum."

Having thus, I think rightly, disposed of this preliminary point, he proceeds to deal with the merits and says: "I ask myself rather what is the substance than what is the form of the proceedings that took place. In form I doubt not that the proceeding was instituted by the plaintiff on behalf of his son, and I was much pressed by the argument that the case came within s. 2 of General Law 68." [His Lordship continued to read from the judgment of Lord Coleridge J. down to the end of the judgment (1), and proceeded:—] There are some difficulties in arriving at this conclusion. I am of opinion that it is not possible to treat a person appealing under General Law 68, s. 2, sub-s. 3, as a member coming within the operation of General Law

(1) See ante, pp. 464, 465.

70, s. 1 (*a*). Moreover, in the present case I find nothing in the laws and rules inconsistent with the deduction of these costs from the sick pay of the son. Having regard to the circumstances of this case and the letters of the plaintiff to the society and the court, I cannot differ from the conclusion in fact of the learned judge, and agree, though not without doubt, that in substance these proceedings were taken by the plaintiff, Richard Catt, on his own account to recoup himself the money that he paid to the asylum for the maintenance of his son. I think the case is a hard one. The plaintiff, without being contumacious, may well, having regard to the form of the proceedings, have honestly believed that he as a member was not a party to the proceedings, and I hope the society will deal leniently with him. But the order of the Court must be that the appeal be dismissed with costs.

KENNEDY L.J. The judgment which I am about to read, and in which I concur, has been prepared by FARWELL L.J.

The appellant was for many years a member of the Ancient Order of Foresters, and in March, 1904, was ordered by the court of appeal instituted by the rules of the order to pay the costs of an appeal. He neglected or refused to comply with such order, and in September, 1904, was suspended under law 70, rule 1 (*a*). His neglect or refusal to comply continued for more than a year, with the result that, under law 40, s. 1 (*d*), he can only rejoin the order in any court as a new member and upon compliance with the order of March, 1904, to the satisfaction of his court and district. Although the word "expulsion" is not used in the section just quoted, the effect of it is, in my opinion, that the member is expelled. On March 24, 1906, the appellant commenced this action for an injunction to restrain the trustees of the society from excluding him from the meetings of the society and from his rights and privileges as a member, and Lord Coleridge J. has dismissed his action. I am of opinion that he was right in so doing.

The appellant has raised two points before us—(1.) ultra vires; (2.) that his application, the costs of which he was ordered to pay, was not made by him as a member, and that no order for costs could

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be made against him. On the first point he does not, and could not, successfully contend that an expulsion clause is ultra vires. As Lord Davey says in *Andrews* v. *Mitchell* (1), "such a power is necessary for the due administration and harmonious working of the society, and a power for that purpose is, therefore, properly given by the rules"; but the appellant contends that such a clause cannot be used for the purpose or with the result of enforcing an award of any of the courts constituted by the rules. He founds his argument on s. 68 of the Friendly Societies Act, 1896, and contends that the words at the end of the first sub-section thereof, "and application for the enforcement thereof may be made to the county court," forbid enforcement by any other means. In my opinion this argument is not well-founded, and, strictly speaking, the exclusion is not a proceeding to enforce payment of the costs at all; it is the penalty for non-payment and assumes and acquiesces in such non-payment. It is one thing to sue a man to compel payment; it is quite another to let the payment go and refuse to remain in partnership any longer with the recalcitrant debtor. Moreover, s. 68 is not confined to orders for payment of money, but extends to every dispute, and all sorts of disputes are referred by the laws of the society to arbitration. If the appellant is right, no award of any sort can be enforced except by order of the county court. Such a contention disregards the whole scope and intent of the Friendly Societies Act, which is to leave the members to settle their disputes for themselves before the domestic tribunals constituted by their own rules, approved by the Registrar of Friendly Societies, and to keep them out of the Law Courts. Even if the expulsion can be regarded as a means of enforcing compliance with the award, it is not open to objection on that account. The Act of Parliament forbids application to any Court of law except a county court, but it does not forbid the enforcement of the awards of the society's courts by other means than litigation, and if the rules, duly certified by the registrar, contain such means by clauses of suspension or expulsion, it is not only not illegal, but it is, in my opinion, the object intended by the Legislature. The application to the county court is rendered necessary because

(1) [1905] A. C. 78, at p. 82.

non-members are, in some cases, parties to arbitrations under the rules; but this does not render it incumbent on the society to have recourse to the county court to enforce their awards against their own members if their certified rules enable them to enforce them without such recourse. The county court is not a Court of appeal or review from the awards, for the Act expressly makes the awards "binding and conclusive on all parties without appeal and not removable into any Court of law or restrainable by injunction."

The second contention is this. Under the Act and rules persons not being members of the society, but claiming either through a member (e.g., as executor) or under the rules, who have a dispute within the meaning of s. 68, must have such dispute settled in manner directed by the rules, i.e., in this case by the several courts of arbitration constituted thereby. The appellant's son became lunatic and was in the county lunatic asylum, and in 1903 the appellant applied to the society for the son's sick pay under law 42. I think it clear on the letters and evidence that the father first applied under s. 3 of that law, alleging that he was a relative dependent on the son for support, in which case the sick pay would have been payable to the appellant for his own relief and maintenance; but this claim failed, and he thereupon claimed under s. 2 on the ground that he had paid for his son's maintenance in the asylum sums in excess of the sick pay, and in this he succeeded. Although the claim is put forward as on behalf of the son, it is to my mind clear that the father claimed for his own benefit just as much and on the same ground as the plaintiff claimed to recover in *In re Rhodes*. (1) The father was dissatisfied with the amount of sick pay awarded him and contended that it ought to have begun from an earlier period, and he appealed, and on March 8, 1904, his appeal was dismissed, and he was ordered to pay the costs. He now objects that this order was not properly made, and, if it was, that it was not made against him as a member, because he was claiming on behalf of his son. On the facts I am clear that he was claiming in his own right and for his own benefit just as a creditor who garnishes a sum due to his debtor does so for himself. But even if this

(1) (1890) 44 Ch. D. 94.

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were not so I think he would be wrong. He was in fact a member, and he was making an application under the rules in respect of a sum to which he could lay claim only under the rules to the tribunal constituted by the rules. It is to my mind irrelevant to say that persons who are not members may make similar applications. If they do, they come in and abide by the rules; but as they have no interest in the funds of the society, some of such rules do not apply to them. There is no means of enforcing obedience by them to the awards except by application in the county court; but this is no reason why the application of such rules should be excluded in the case of applicants who are in fact members. The power to apply to the county court may well have been given because some of the parties to arbitrations might not be members, and there might therefore be no means of enforcing such awards against them. No argument can, in my opinion, be fairly founded on this which would prevent the society from enforcing such remedies as the rules in fact give it against its own members. The phrase "as a member" is taken from the judgments in the cases cited and correctly summarizes the basis on which those cases proceeded, but nothing more; and those cases have, in my opinion, no application to the present case. A man who mortgages his property to his society does not lose his rights as mortgagor because the mortgage transaction is outside the scope of the general contract between him and the society. Or if the society denies that A. is a member of the society at all, they cannot get an action by him stayed on the ground that he ought to go to arbitration as a member. But those considerations have no application to a case like the present, which comes within the reasoning of Lord Hatherley in *Mulkern* v. *Lord*. (1) All the matters here are well within the scheme and scope of the society itself, and that is the true test when the question whether a claim is by or against a member as such has to be determined. I have great doubt whether the contention that no order for costs could be made against the appellant, assuming him to be claiming on behalf of his son, is open to the appellant in any Court of law. Law 68, s. 4, provides that the court may charge "either party" with

(1) 4 App. Cas. 182, at p. 192.

costs, and law 70, s. 3, provides that in cases of appeal the same parties only shall be appellant and respondent who were such at the original arbitration, and shall be responsible for any costs. I think there is great force in the argument that the construction of the word "parties" is for the domestic courts, not for this Court. An arbitrator cannot, of course, give himself a jurisdiction beyond that conferred on him by the submission, but it is within the scope of his authority to construe the various clauses in the reference. But however this may be, I am of opinion that the word "parties" in these rules includes the persons who claim on behalf of members as well as members claiming in their own right. If it were not so, a dishonest claim by a relative or an alleged wife could only be dismissed at the cost of the person whose money was wrongfully claimed. The definition clause in the Judicature Act, 1873, s. 100, enacts that "parties shall include every person served with notice of or attending any proceeding, although not named on the record." Whether this includes next friend or not, it is clear that a next friend is liable to pay costs; and in my opinion the true construction of "parties" in these rules includes all persons who initiate claims, whether they do so for themselves or on behalf of others.

Appeal dismissed.

Solicitors for plaintiff: *Russell & Arnholz.*

Solicitors for defendants: *W. J. & E. H. Tremellen, for S. Ward, Dudley.*

W. J. B.

Considered. *In re* A DEBTOR (No. 21 OF 1950) [1951] 1 Ch. 313

Applied. *Re* A DEBTOR (No. 21 OF 1950). [1950] 2 All E.R. 1129.

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[IN THE COURT OF APPEAL.]

In re A JUDGMENT DEBTOR, 530 OF 1908.

Bankruptcy—Bankruptcy Notice—Irregularity—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice headed "Ex parte P. and S. trading as the H. Brick Company" required the debtor to pay to P., of &c., and S., of &c., giving their private addresses, 50*l.* odd, the balance due on a final judgment obtained by them against the debtor, unless (among other alternatives) he satisfied the Court that he had a counter-claim, set-off, or cross-demand against "the said P. and S. trading as the H. Brick Company" which equalled or exceeded the sum claimed by them and which could not have been set up in the action. The judgment was obtained by the creditors in their trading capacity:—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), that the notice was calculated to embarrass the debtor, inasmuch as it did not follow the terms of the judgment, and that it ought to be set aside.

Semble, *per* Kennedy L.J.: Where judgment has been obtained for a partnership debt by two persons trading as a firm, a proper form of bankruptcy notice would be "Pay to A. and B. trading as &c. or to either of them."

APPEAL from an order of one of the registrars of the Court of Bankruptcy.

On July 29, 1907, William Paye and William Skipp, trading as the Hertingfordbury Brick Company, commenced an action in the King's Bench Division by specially indorsed writ against James Gilbert & Co. as principals, and the debtor as surety, for 111*l.* 6*s.* 6*d.*, the price of goods sold and delivered by the plaintiffs to James Gilbert & Co. on the guarantee of the debtor. The writ stated that it was issued by Ridsdale & Son, giving their address for service, as agents for Chalmers-Hunt & Davies, of Ware, in the county of Herts, solicitors for the plaintiffs; and it concluded as follows: "The plaintiff William Paye resides at Oak Villa, Enfield Highway, Middlesex, and the plaintiff William Skipp resides at Hope House, Ware, Herts." On September 2 the plaintiffs obtained leave to sign final judgment for the amount indorsed on the writ. In the heading of the judgment the plaintiffs were described as trading as the

Hertingfordbury Brick Company, and it was thereby adjudged "that the plaintiffs recover against the defendants 111*l.* 6*s.* 6*d.* and 8*l.* 16*s.* costs." Certain sums having been paid by the defendants on account of this judgment, but the judgment not having been completely satisfied, on February 24, 1908, the judgment creditors served on the debtor a bankruptcy notice intituled "In re" the debtor, giving his name, "Ex parte William Paye and William Skipp, trading as the Hertingfordbury Brick Company," in the following terms: "Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to William Paye, of Oak Villa, Enfield Highway, in the county of Middlesex, and William Skipp, of Hope House, Ware, in the county of Herts, the sum of 50*l.* 12*s.* 6*d.* claimed by them as being the balance of amount due on a final judgment obtained by them against you and James Gilbert & Co. in the High Court of Justice, King's Bench Division, dated September 2, 1907, whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction, or the satisfaction of the Court, or you must satisfy the Court that you have a counter-claim, set-off, or cross-demand against the said William Paye and William Skipp, trading as the Hertingfordbury Brick Company, which equals or exceeds the sum claimed by them and which you could not set up in the action in which the judgment was obtained."

The registrar, following the case of *In re Howes, Ex parte Hughes* (1), held that this notice must be set aside as embarrassing to the debtor, inasmuch as it was not in accordance with the judgment. (2)

The judgment creditors appealed.

(1) [1892] 2 Q. B. 628.

(2) By sub-s. 1 of s. 4 of the Bankruptcy Act, 1883, "a debtor commits an act of bankruptcy in each of the following cases:"

"(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after

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Frank Phillips, for the judgment creditors. *In re Howes* (1), on which the registrar relied, is distinguishable, because in that case the debtor was not told either by the judgment or by the notice whom he was to pay. Here the judgment was a judgment in favour of Paye and Skipp, trading as the Hertingfordbury Brick Company, and the bankruptcy notice was headed in the same way, but it required payment to Paye and Skipp simply. It is obvious that the firm, and the firm only, were intended by this notice, and it is impossible that the debtor could be embarrassed by it. A mere trivial informality is not sufficient to invalidate a notice: *In re Murrieta.* (2)

[COZENS-HARDY M.R. referred to *In re Winterbottom.* (3)]

The sole question is whether the notice would or would not embarrass the debtor.

Edward Clayton, for the debtor. Bankruptcy notices must be dealt with very strictly by reason of the penal consequences arising therefrom. The important thing to look at is the body of the notice, which shews what has to be done. Not only is the body of the notice wrong in requiring payment to the judgment creditors without stating that it is in their capacity of partnership traders, but the provision as to the counter-claim is wrong in stating that it must be made against them in that capacity; there is no such necessity. The principle of *In re Howes* (1), which is the converse of this case, applies.

Frank Phillips replied.

COZENS-HARDY M.R. In my opinion the decision of the registrar in this case was right. I approach this question impressed with the idea that a bankruptcy notice, which is the foundation of a bankruptcy, attended as a bankruptcy is with penal consequences, is a matter in which great strictness is

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the service of the notice . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(1) [1892] 2 Q. B. 628.

(2) (1896) 3 Man. 35.

(3) (1886) 18 Q. B. D. 446.

required and, so far as I am aware, always has been required since the Bankruptcy Act of 1883. I need not quote authorities on that point, because that is really admitted by both sides. The notice is given in pursuance of a statutory provision—s. 4, sub-s. 1 (*g*), of that Act. [The Master of the Rolls read the clause, and continued:—]

In the present case a writ was issued by William Paye and William Skipp, trading as the Hertingfordbury Brick Company. The claim was against James Gilbert & Co. as principals and the debtor as surety for the price of goods sold and delivered to the company on the guarantee of the debtor.

Judgment was signed in the action at a considerably later period for 111*l.* 6*s.* 6*d.* and costs. That was reduced subsequently, and the bankruptcy notice which was given is in these terms: [The Master of the Rolls read the notice.] What is the effect of that? The judgment was a judgment that "the plaintiffs recover, &c.," and they sued as partners. It is quite true that in the writ in the action their private addresses were given as they were given in this notice, but they sued and recovered judgment as partners alone.

The notice requires that payment should be made to them, not as partners, not as trading as the Hertingfordbury Brick Company, but as individuals living in different counties, although I attach no importance to that. In short, it requires and exacts payment to two individuals, whereas by the judgment payment to one of them is all that the law required. In my opinion that is not in accordance with the terms of the judgment. I think that this case, although not identical with *In re Howes* (1), is in some respects a stronger case than that—a decision which is binding on us. In that case the writ was indorsed with a claim by the plaintiffs "as trustees of St. John's Hospital in the town and county of Northampton" for damages for breach of covenant. The judgment was headed "between the Rev. Nathaniel Thomas Hughes and others plaintiffs and Elizabeth Howes and Mark Howes defendants," not describing the plaintiffs as they were described in the writ, namely, as trustees of St. John's Hospital, and it was adjudged

(1) [1892] 2 Q. B. 628.

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that the plaintiffs recover against the defendants a certain sum. Then the notice required payment within seven days "to the Rev. Nathaniel Thomas Hughes and others (trustees of the charity known as St. John's Hospital, Northampton)," that being the very description of those persons given in the writ, because they were there described as trustees of the hospital; but because there was this addition, which was strictly in accordance with the facts known to the defendants, it was held by the Court of Appeal that the bankruptcy notice was not in accordance with the terms of the judgment; that it was calculated to perplex the debtor; and that it ought to be set aside. Here I think the notice was very much more calculated to puzzle and perplex the debtor, because the debtor was told that he must pay two people when he was under no obligation to pay more than one. That does seem to me to be a substantial matter—"substantial," I mean, in the sense in which it is right to use that word when dealing with such a technical matter as a bankruptcy notice. This is in substance the view that was taken by the learned registrar; I think it is right and that this appeal fails.

BUCKLEY L.J. In that which I am about to say it is scarcely necessary to state that I do not intend to throw the slightest doubt upon the proposition that bankruptcy notices are to be strictly construed, or upon the proposition that the notice must be one "requiring the debtor to pay the judgment debt in accordance with the terms of the judgment." But, bearing all that in mind, I cannot myself see that there is any defect in this bankruptcy notice.

The facts are as follows. On July 29, 1907, a writ was issued in which the plaintiffs were William Paye and William Skipp, trading as the Hertingfordbury Brick Company, and in which the addresses of the plaintiffs were given at their several private residences. On that writ, on September 2, 1907, judgment was signed. The creditors were described in the heading as "William Paye and William Skipp trading as the Hertingfordbury Brick Company," and it was adjudged that "the plaintiffs recover against the defendants, &c." So that was a judgment for Paye and Skipp,

trading as the Hertingfordbury Brick Company. Certain sums were paid off, and there was a balance of 50*l.* odd said to be due at the date when the bankruptcy notice was given. The bankruptcy notice is dated February 24, 1908. It is intituled in the matter of the debtor, "Ex parte William Paye and William Skipp trading as the Hertingfordbury Brick Company." That means that in the matter of the debtor Paye and Skipp, trading as the Hertingfordbury Brick Company, are giving a notice with a view to founding proceedings before the Court in bankruptcy. The notice says that "You must pay to William Paye" (giving his address as in the writ) "and William Skipp" (giving his address as in the writ) "the sum of 50*l.* 12*s.* 6*d.* claimed by them as being the balance of the amount due on a final judgment obtained by them against you and James Gilbert & Co. in the High Court of Justice, King's Bench Division, dated 2nd September, 1907"; and it concludes as follows: "Or you must satisfy the Court that you have a counter-claim set-off or cross-demand against the said William Paye and William Skipp trading as the Hertingfordbury Brick Company which equals or exceeds the sum claimed by them and which you could not set up in the action in which this judgment was obtained."

I understand that notice to say this: "Take notice that we, A. and B., trading as the X. firm, require you to pay to A. and B. so much money unless you can establish a counter-claim against A. and B., trading as such firm, which equals or exceeds the sum claimed." How is the debtor in any way embarrassed by that notice? He knew exactly who were asking him for payment and of what. Of course he knew that the two applicants, trading as the firm, were the plaintiffs in the action. The alleged defect is that the notice did not say "We require you to pay us in a particular character." Is that a valid objection? The application was made by them in that character, and payment was required to be made to them without more. I should have thought there was not much difficulty in saying that the payment required by that notice was a payment to be made to them in the character in which they required payment. To my mind the provision as to the counter-claim at the end assists that, because the applicants are there

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Buckley L.J.

described as partners. The point of the matter, however, is in the title. They apply as partners in a firm, and they require payment of a judgment debt recovered by them as partners in a firm, as the debtor knew.

It is said that *In re Howes* (1) governs this case; if it did I should be bound to follow it. I do not see that it does. *In re Howes* (1), as I understand it, was this: A writ was issued in which the Rev. N. T. Hughes and a number of other persons named in the writ sued the defendants and indorsed their writ with a claim by the plaintiffs "as trustees of St. John's Hospital." They took a judgment in the form that "the Rev. N. T. Hughes and others" should recover so much money. A judgment in that form is of course wrong. The debtor cannot tell from that form of judgment whom he has to pay. Who are "Hughes and others"? The judgment was embarrassing and could not, I think, have been the foundation of a bankruptcy notice. Further, the bankruptcy notice required the debtor to pay "Trustee N. T. Hughes and others (trustees of the charity known as, &c.)." Upon that form of judgment and that form of bankruptcy notice I understand the Court of Appeal to have said this: Judgment in favour of "Hughes and others" could not be the foundation of a bankruptcy notice because it wanted certainty. The bankruptcy notice to pay "Hughes and others as trustees" did not follow the terms of the judgment and did not supply the names of the "others." I may point out that the bankruptcy notice put the debtor in this embarrassment—and it was a very considerable embarrassment—that if he was going to satisfy the judgment it lay upon him to find out who were the trustees. The judgment and notice ought to have told him. Those were the objections which the Court found in the bankruptcy notice there. The decision of the Court may be summarized in a passage in the judgment of Bowen L.J., which I will read with some observations. "A bankruptcy notice ought to inform the debtor clearly who is the creditor whom he is required to pay. In the present case the judgment gives the debtor no such information"—that means that a judgment to pay "Hughes and others" does not give the information—

(1) [1892] 2 Q. B. 628.

"and the bankruptcy notice does not supply the defect"—that means that the bankruptcy notice stated that the debtor was to pay Hughes and others, trustees, leaving the debtor to find out who were the trustees. That case, in my opinion, is no authority for saying that a notice which shews that the application is made by A. and B. as members of a firm, but in the words which require payment does not say "You are to pay A. and B. in the character in which A. and B. are making the application," is embarrassing. I think it is plain on the face of the notice that the plaintiffs were applying as members of the firm, and the notice required payment to them. To my mind there is no difficulty whatever in saying that the debtor was to pay them as members of the firm. For these reasons I think that the bankruptcy notice was good.

KENNEDY L.J. In this case I agree with the Master of the Rolls in thinking that the decision of the learned registrar was right. One has to consider two things in dealing with this technical point. In the first place one has not to determine the validity or invalidity of the notice by considering whether the debtor to whom the notice is given has in fact been misled. It is sufficient that there is good ground for saying that the debtor might be misled. That is, I think, settled by authority. Secondly, in judging of the probability of the debtor being misled, one is bound not to deal too liberally with the requisites of the notice because of the quasi penal consequences which a bankruptcy involves. My own view is that in considering this particular notice one may take into account the position of a debtor who is not necessarily learned in the law. This is not one of those cases in which a knowledge of the law upon the question whether payment of a debt due to two persons as partners can properly be made to one or must be made to both together is to be imputed to the person required to make the payment. One must remember that these bankruptcy notices may be served on people who are possibly illiterate, certainly not on people who are to be treated as versed in the law. We have to see whether treating the debtor as an ordinary person we might reasonably suppose that he

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might be misled. Here the judgment was properly obtained in the action by the plaintiffs trading as the Hertingfordbury Brick Company. I need not review the facts, because they have been already stated. The notice which was served on the debtor for payment of the 50*l.* which the plaintiffs conceived to be due to them under that judgment was headed rightly, but it directed the debtor to take notice that he was to pay not to them as partners, nor to one of them as one of the partners, but to them as individuals. I am not sure whether any form has ever been settled for a notice of this kind, but I should have thought a proper form would be "Pay to A. and B. trading as &c. or one or either of them." That would have told the debtor what he had to pay, namely, a partnership debt, and that payment to either partner was in accordance with the terms of the judgment. That is what is required by the terms of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act. Instead of that the notice tells him he must pay the same sum of money to both of the parties. In a sense it was due to both, but it was an obligation which might be discharged, having regard to the nature of the liability, by payment to either of them; and in that respect this notice is, in my opinion, possibly misleading. Then, having told the debtor that payment is to be made to both, the notice concludes as follows: "Or you must satisfy the Court that you have a counter-claim set-off or cross-demand against the said William Paye and William Skipp trading as the Hertingfordbury Brick Company which equals or exceeds the sum claimed by them and which you could not set up in the action in which the judgment was obtained."

It is quite true that a person who is a lawyer, or who has a lawyer to advise him, may know, or in the second case would learn, that if he has got a counter-claim in debt against the two creditors, although not in connection with the firm's business, he would be entitled to set off this debt against the debt which was the subject of the notice. But I think that to limit the right to counter-claim to a claim against the plaintiffs trading as the Hertingfordbury Brick Company is to add a further possible cause of error to that which I think is a possible cause of error in the body of the notice where it states the

obligation. As regards the authorities, as the facts will hardly ever be the same, there is not much use in comparing the cases. I cannot help thinking that *In re Howes* (1) was in a sense a weaker case, because the main ground of the application was that the judgment was in a form which was objectionable, inasmuch as the creditors were therein described as the Rev. Nathaniel Thomas Hughes and others, without saying who the others were. I have some doubt how far an objection to a notice based upon a wrong form of judgment comes within s. 4, sub-s. 1 (*g*). But what happened in that case was that some enlightenment was afforded by the notice. The notice bettered the judgment in the sense of correcting or doing something to correct it by telling the debtor that the judgment creditors Hughes and others were trustees of a certain charity. If one looks at the comparative chances of the debtor being misled, those chances were diminished by the notice, although the judgment, I agree, was itself obscure so far as regards the persons to whom the debt was to be paid. Here is a possibly misleading notice, which was not in accordance with the terms of the judgment. I think we ought to follow the practice of the Court in such cases and hold this notice to be invalid, although the objection to the validity may be in a sense a technical one, and although there is no evidence that the debtor was in fact actually misled.

Appeal dismissed.

Solicitors: *Ridsdale & Son; Corbould, Ellis & Mitchell.*

(1) [1892] 2 Q. B. 628.

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[IN THE COURT OF APPEAL.]

BURGIS AND OTHERS *v.* CONSTANTINE.

Trustee and Cestui que Trust—Principal and Agent—Conflicting Equities—Contract by Trustee to charge Trust Property in Breach of Trust—Priorities—Ship—Registered Owner holding as Trustee—Beneficial Owner allowing Legal Ownership to remain vested in Trustee — Negligence—Estoppel—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 24, 26, 31, 56, 57.

In furtherance of a project for the formation of a company to purchase a ship, the plaintiffs, who were owners of shares in the ship, executed transfers of their respective shares to one H., the senior partner in a firm of H. & Co., which managed the ship's business, as trustee for them, with power to sell the shares to the company if formed; and H. was registered as owner of the shares in the register of shipping at the port to which the ship belonged. The project for formation of the company proved abortive, but the above-mentioned shares were not reconveyed to the plaintiffs. Subsequently, a son of H., who acted as the manager of H. & Co.'s financial business, obtained for the purposes of the firm from the defendant, through an agent for the defendant, without the knowledge or authority of the plaintiffs, an advance of money, which was intended to be secured by a mortgage by H. of the above-mentioned shares. A document, which purported to be, and was registered as, such a mortgage, turned out to be a nullity, never having been duly executed by H., the aforesaid manager having obtained H.'s signature to a printed form with blank spaces, which he subsequently handed to the defendant's agent for the purpose of his filling in the blank spaces with the material particulars of the proposed mortgage, which he did. The money advanced by the defendant was used for the purposes of the firm. The defendant had no notice of the plaintiffs' interest in the shares. In an action brought by the plaintiffs, claiming that the mortgage deed should be declared void, and the entry of it expunged from the register, Bigham J. granted the relief claimed; but, thinking the effect of the evidence to be that H. had agreed with the defendant to give such a mortgage, he held that, inasmuch as the plaintiffs had entrusted H. with authority to deal with their shares in the ship, although he had not dealt with them in accordance with the authority given, the defendant was entitled in equity to a charge on the shares:—

Held (reversing the decision of the learned judge), that the fact that the plaintiffs had constituted H. the legal owner of the shares, and allowed him to appear as such on the register, did not, under the above-mentioned circumstances, give rise to an equity entitling the defendant

as against the plaintiffs to a charge upon the shares as security for the money advanced by him.

Rimmer v. *Webster*, [1902] 2 Ch. 163, discussed.

APPEAL from the judgment of Bigham J. in an action tried by him without a jury.

The action was brought by the plaintiffs, as beneficial owners of shares in a ship called the *Greta Holme*, claiming a declaration that an alleged mortgage of those shares by one Wilfrid Hine to the defendant should be declared void, and that the defendant was not entitled to be registered as mortgagee of the shares, and an order that a document purporting to be such a mortgage should be cancelled, and that the entry thereof should be expunged from the register.

In the year 1897 the plaintiffs were the registered owners of twenty-one sixty-fourth shares in a ship called the *Greta Holme*, belonging to the port of Maryport, and forming one of a line of steamers called the "Holme Line." This line of steamers was managed by a firm called "Hine Brothers," of which one Wilfrid Hine was the senior partner. That firm had an office at Maryport, and also one in London, which latter was under the control of one Alfred Ernest Hine, a son of Wilfrid Hine, who was in the employment of the firm, and to whom the management of the financial matters of the firm was entrusted at the time when the transactions out of which the action arose took place. In the year 1898 a project had been started for the formation of a company to be called "Hine Brothers, Limited," for the purpose of taking over the Holme Line. In pursuance of that project a circular dated November 30, 1898, and signed by Wilfrid Hine, was sent out to, among others, the plaintiffs respectively, enclosing a draft prospectus of the proposed company and a valuation of the various steamers of the Holme Line. The circular stated that it was proposed that the sum representing the value of the shares in the ships belonging to the persons to whom it was sent should be satisfied as to 90 per cent. in fully paid ordinary shares and 10 per cent. in fully paid preference shares in the proposed company, and then proceeded as follows: "Will you please sign the memorandum at foot hereof, and also the enclosed bill of sale, in exchange for

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which I undertake to send you share certificates for the above shares in Hine Brothers, Limited, when allotted. As time is very important, I shall be glad if you will return the documents to me at your earliest convenience, and I have no hesitation in saying that I consider this arrangement will be to your interest, and that I am making no profit out of your shares, but will merely hold your interest in the ship in trust for you, pending the allotment of the shares to which you are entitled." In response to that circular the plaintiffs respectively executed bills of sale of their shares in the *Greta Holme*, and signed the enclosed memorandum, which was as follows: "I hereby agree to accept the terms of your letter of November 30, 1898, and send herewith a bill of sale on the understanding that you hold my interest in the ship *Greta Holme* referred to in trust for me as therein set forth, and I hereby authorize you to enter into a contract for sale to the proposed company of my interest in the said ship." After Wilfrid Hine had received the bills of sale from the plaintiffs, he caused himself to be registered as the owner of their shares in the register at the ship's port of registry, thereby becoming the legal owner of the shares. Efforts were made to carry out the project for the formation of a company, which continued down to the year 1906, but the project ultimately proved abortive. The plaintiffs' shares in the *Greta Holme* were, however, not reconveyed to the plaintiffs.

In the year 1907, money being required for the purposes of the firm of Hine Brothers, Alfred Ernest Hine applied to one Holman, who was acting in the matter as the defendant's agent, for an advance of 4000*l.* upon the security of the freight of a ship called the *Isel Holme* and also of twenty-seven shares in the *Greta Holme*, which included the shares of which the plaintiffs were the beneficial owners. This application having been communicated by Holman to the defendant, who had no notice of the plaintiffs' interest in the shares, he agreed to make the advance upon those terms. Alfred Ernest Hine, who had obtained from Wilfrid Hine his signature to a printed form of mortgage with blank spaces, handed it to Holman in order that he might fill up the blank spaces in the form with the particulars of the proposed mortgage of the shares in the *Greta Holme*. This Mr.

Holman subsequently did at his office, and the advance of 4000*l.* was thereupon made by the defendant, and was used for the purposes of the firm. The defendant caused the above-mentioned document to be registered in the shipping register as a mortgage. Bigham J., upon the above-mentioned facts, held that the defendant must be taken to have had notice through his agent Holman that at the time when Wilfrid Hine's signature was appended to the document it was a mere blank form, and so there could be no question of estoppel, and that the supposed mortgage, not being the deed of Wilfrid Hine, was a worthless and void document. He therefore made an order declaring that the alleged mortgage was bad and the entry of it must be expunged from the register. But he came to the conclusion that Wilfrid Hine knew that the advance was made by the defendant in consideration of a mortgage of the shares; and he held, on the authority of *Rimmer* v. *Webster* (1), that, inasmuch as the plaintiffs had entrusted Wilfrid Hine with authority to deal with their shares in the ship, although he had not dealt with them in accordance with the authority given, the defendant had an equitable right as against the plaintiffs to a charge on their shares in the *Greta Holme* as a security for the repayment of the money which he had advanced, and he accordingly gave judgment declaring the defendant to be entitled to such a charge.

The plaintiffs appealed against the last-mentioned portion of that judgment.

J. A. Hamilton, K.C. (*Maurice Hill* with him), for the plaintiffs. If the defendant had obtained a mortgage by bill of sale in accordance with the provisions of the Merchant Shipping Act, 1894, such a mortgage would, no doubt, by virtue of the provisions of that Act, have prevailed against the title of the plaintiffs: see *The Horlock.* (2) But it is now clear that the defendant has no legal title to the shares, the supposed mortgage being a nullity. The only question, therefore, is whether, as the learned judge decided, the defendant has an equitable right to a charge upon the shares which overrides the beneficial ownership of the plaintiffs. There are no facts in this case which can give

(1) [1902] 2 Ch. 163. (2) (1877) 2 P. D. 243.

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rise to such an equitable right. The case of *Rimmer* v. *Webster* (1) is not really in point. That was a case of an agent entrusted with a security for sale. There is really no question of agency in this case. Authority was no doubt given to Wilfrid Hine to dispose of the shares to the projected company, but the project for forming the company had long become abortive, and at the time of the supposed mortgage Wilfrid Hine had no authority to deal with the shares. He was merely trustee of them for the plaintiffs. The only fact upon which the defendant can rely was that Wilfrid Hine was allowed by the plaintiffs to remain the registered owner of the shares. That fact cannot possibly give rise to such an equity as the defendant claims. It is an ordinary incident of our legal system that property should be vested in trustees; and it cannot be suggested that the mere fact that the legal ownership of property is allowed by the beneficial owner to remain vested in a trustee constitutes such conduct as to operate by way of estoppel against the beneficial owner, or to entitle a person dealing with the trustee to infer that he was the beneficial owner of the property and to give such a person, not having the legal ownership, a better title in equity than the beneficial owner. In all the cases in Courts of Equity in which an equitable claim arising subsequently in point of time has been held to override a prior equitable right there has been some element in the nature of negligence on the part of the owner of that right or other conduct by him such as rendered it just that his right should be postponed to that of the person who had been prejudiced by his conduct. [He also cited *Briggs* v. *Jones* (2); *Northern Counties of England Fire Insurance Co.* v. *Whipp* (3); *In re Castell & Brown* (4); *In re Valletort Sanitary Steam Laundry Co.* (5); Lewin on Trusts, 11th ed. 901.]

Scrutton, K.C. (*Bailhache, K.C.*, with him), for the defendant. The defendant is entitled in equity to a charge on the shares overriding the plaintiffs' interests. This case cannot properly be regarded as being merely one in which the legal estate in property has been allowed by the beneficial owner to

(1) [1902] 2 Ch. 163.
(2) (1870) L. R. 10 Eq. 92.
(3) (1884) 26 Ch. D. 482.
(4) [1898] 1 Ch. 315.
(5) [1903] 2 Ch. 654.

remain vested in a trustee, but must be decided on the principles applicable to cases of agency, as laid down in *Rimmer* v. *Webster*. (1) The plaintiffs' shares were originally vested in Wilfrid Hine, with authority to deal with them by disposing of them to a company. There was really nothing to shew that this authority was exhausted; and, by virtue of the provisions of the Merchant Shipping Act, 1894, the fact of a person being registered as owner of a ship enables him to give a good title to a bona fide purchaser or mortgagee; and, therefore, any one finding a person so registered is entitled to presume that, if another person is beneficial owner, he has entrusted to the registered owner power to deal with the ship. The law was thus laid down by Farwell J. in *Rimmer* v. *Webster*. (2) After stating that the principle underlying the cases on the subject is that the man possessed of the prior equity cannot be deprived of his title, unless he has been guilty of some negligence, and that the word "negligence" imports the neglect of some duty to a person injured, he says that, if the indicia of title are entrusted by the owner to a person with the intention that he should deal with them in any way, "the case then falls to be decided in accordance with the principles governing the cases of authority given by a principal to an agent; and the owner comes under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority which he has by his own act made apparently co-extensive with absolute ownership . . . . the authority which the owner has given can only be limited by the indicia of property which he has given; the particular authority proved or admitted is necessary in order to make the case one to which the principles of agency apply at all: but, when that is once proved, and the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee . . . . the gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the

(1) [1902] 2 Ch. 163. (2) Ibid. at pp. 172, 173.

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indicia of title as absolute owner for the purpose of enabling him to deal with the property, although in a limited way only; whether the trust was to sell only, or to mortgage only, is immaterial, if the mortgagee or purchaser had no notice of the existence of any trust at all." It is submitted that the present case comes within the principle so laid down. Here Hine, by being allowed to become registered owner of the shares, was invested with all the indicia of title as absolute owner for the purpose of dealing with the shares, though in a limited way only, namely, by selling them to a company to be formed, but the defendant had no notice of any trust at all. [He also cited *Brocklesby* v. *Temperance Permanent Building Society* (1); *Bradley* v. *Riches* (2); *Taylor* v. *Russell* (3); *Shropshire Union Railways and Canal Co.* v. *The Queen.* (4)]

J. A. Hamilton, K.C., for the plaintiffs, was not called upon to reply.

SIR GORELL BARNES, PRESIDENT. The question which has been argued before us is one of some importance, though it is not raised on the pleadings and is not the question upon which the case was really fought at the trial.

In order to render the observations which I propose to make intelligible, it is necessary to state shortly the nature of the action, and the facts, so far as material. The plaintiffs were originally the registered owners, and still are the beneficial owners, of twenty-one sixty-fourth shares in the *Greta Holme*, a ship which formed one of a line called the "Holme Line," and which, as I gather, was under the management for business purposes of a firm called Hine Brothers. In or about the year 1898 it was proposed that a company, to be called "Hine Brothers, Limited," should be formed for the purpose of taking over the *Greta Holme* together with the other vessels forming the Holme Line, and that shares in this company should be allotted to the respective owners of the different shares in the vessel to an amount equivalent to their respective interests. In pursuance of this scheme a circular was issued to the plaintiffs

(1) [1895] A. C. 173.
(2) (1878) 9 Ch D. 189.
(3) [1892] A. C. 244.
(4) (1875) L. R. 7 H. L. 496.

respectively, signed by Wilfrid Hine, a member of the firm of Hine Brothers, to which was attached a memorandum for signature by the recipient. This circular and the memorandum were in the following terms. [The learned President here read the circular and memorandum, the purport of which has been before given.] The plaintiffs respectively signed the memorandum attached to the circular, and sent bills of sale transferring their respective shares to Mr. Wilfrid Hine. Attempts were subsequently made to form the proposed company, but, for some reason or other, they do not appear to have been successful, and matters were allowed to drift for a considerable time. In the meantime Mr. Wilfrid Hine, whether with or without the knowledge of the plaintiffs—it does not appear to me to make any difference—caused the shares to be registered in his own name, and they so remained until the events occurred which led to this action being brought.

In 1907 there was registered a document which purported to be a mortgage of twenty-seven sixty-fourth shares in the *Greta Holme*, which included the shares of which the plaintiffs were beneficial owners, by Wilfrid Hine to the defendant. The plaintiffs allege in their statement of claim that this supposed mortgage and the registration thereof are wholly void, and that the defendant is not entitled to be registered as mortgagee of the shares in question, or to any charge upon them. I will read what they allege, because it is upon this that the contest at the trial mainly turned. It is as follows:—"In or about the month of April, 1907, one A. E. Hine, without the authority of the said W. Hine, or any of the plaintiffs, gave to the defendant a blank form of mortgage, which bore the signature of the said W. Hine, but was not otherwise filled in; and the defendant by himself or his agent subsequently filled in the said form as a mortgage." Then they claim a declaration that the alleged mortgage is void, and that the defendant is not entitled to be registered as mortgagee, and that the mortgage deed should be cancelled and the entry thereof expunged from the register. The defence set up by the defendant is as follows:—After various paragraphs traversing the allegations contained in the plaintiffs' claim, he states in paragraph 5 that "the defendant is a bona fide

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purchaser for value by way of mortgage of the shares in question without notice of any interest of the plaintiffs therein, and has been and is duly registered as a mortgagee thereof, and has an indefeasible title to the said shares as such mortgagee."

I adopt for the purposes of my judgment the conclusions of fact arrived at by Bigham J. with regard to this alleged mortgage. He says in his judgment: "Mr. Constantine" (the defendant) "agreed to make the advance proposed, and on April 10 this in my opinion took place. Mr. Alfred Ernest Hine, who was anxious to get the money, gave the charge on the freight, and he also asked Mr. Holman to furnish him with a blank form of mortgage for his father to sign; he took it away from Holman's office, and obtained his father's signature to the blank form, and then took it back to Mr. Holman and left Mr. Holman to fill it up with the particulars relating to the twenty-seven sixty-fourth shares. The loan was then made on the same day, I think, April 10. 4000*l.* was advanced by Mr. Constantine. The security for that loan was perfected in Mr. Holman's office, and by Mr. Holman himself. Mr. Holman drew out the assignment of the freight, and filled up the blank form of mortgage, which had been obtained in the way described by me. Mr. Holman did that, in my opinion, as the agent, and on behalf, of Mr. Constantine, the present defendant, and I think in this case it must be taken that Mr. Constantine through his agent in that behalf had notice that, at the time that Mr. Wilfrid Hine's signature was appended to that document, it was a mere blank form; and, if such notice is to be imputed to him, there can be no question of estoppel, because he knew the truth, and there can be no estoppel in favour of a man who himself knows the truth of the circumstances." The result is that, although the parties were not aware of it at the time—it was not suggested that Mr. Holman had the slightest idea that this way of carrying out the mortgage would lead to any difficulty—in fact the document which was registered as a mortgage was a wholly worthless document. The question upon which the case was really fought at the trial was whether the mortgage was a good mortgage or not; and Bigham J., as I have said, came to the conclusion that it was bad, not having, under the circumstances, been so executed

as to make it a valid document, though the parties may have thought that they were carrying out a perfectly valid transaction.

The further point, however, was taken by the counsel for the defendant that, although the so-called mortgage gave the defendant no title whatever, notwithstanding the fact that he had been placed on the register in respect of it, and had advanced money on the strength of it, nevertheless he was entitled to such an equity as would defeat, to the extent of the advance which he had made, the beneficial interest of the plaintiffs in the shares in question. Bigham J. held that, the so-called mortgage being a nullity, the register must be rectified by expunging it therefrom; but he went on to deal with the point raised by the defendant's counsel at the trial, though not raised by the defendant's pleadings; and he held that, though the mortgage must be expunged from the register, the defendant had an equity which must prevail over the title of the plaintiffs, and, that being so, the plaintiffs could not obtain the benefit of their property without discharging his claim.

In order to see whether the view so taken by the learned judge was correct, it is necessary, I think, to refer to one or two sections of the Merchant Shipping Act, 1894. As I have already mentioned, the name of Mr. Wilfrid Hine had been placed on the register as owner of the shares, which register would contain no mention of any trust upon which he held them. The Merchant Shipping Act, 1894, makes provision for the registration of ships, and of transfers of registered ships, or shares in ships, by way of sale or mortgage. By s. 24, sub-s. 1, of the Act it is provided that "a registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale," and sub-s. 2 of the same section provides as to the form of the bill of sale, and that it shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses; and by s. 26, sub-s. 1, "every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall endorse on the bill of sale the fact of

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that entry having been made, with the day and hour thereof." Then, with regard to mortgages, it is provided by s. 31, sub-s. 1, that "a registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book." By sub-s. 2, "Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the day and hour of that record." It is not necessary for me to read all the sections of the Act with regard to bills of sale of ships and mortgages, but the effect of the Act is to provide a machinery for the transfer of the complete ownership of, or of any interest by way of mortgage in, a ship or shares therein by a group of sections, of which those to which I have referred form a part. Then s. 56 provides that "no notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose *in manner in this Act provided* of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration"; and by s. 57, "the expression 'beneficial interest,' when used in this part of this Act, includes interests arising under contract, and other equitable interests; and the intention of this Act is that, without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests

may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property."

The point now raised is that the defendant, though the so-called mortgage deed is worthless, has an equity which ought to prevail over the equity of the plaintiffs as beneficial owners. I confess that I feel some diffidence in dealing with a question of conflicting equities in the presence of so distinguished an Equity judge as my brother Farwell, but the point involved in this case seems to me to be really of a simple character. Seeing that the Merchant Shipping Act, 1894, has provided for the registration of the names of owners of ships, or shares in ships, who are thereby to be held out to the world as the persons entitled to deal with the same, and a machinery has been provided by which they may give a good title to such ships or shares by way of sale or mortgage "in the manner provided by the Act," it would require a very strong case, I think, to say the least, to shew that any person who does not avail himself of the protection afforded by the machinery so provided can obtain a title as against persons who were originally beneficially interested, so as to defeat their rights, when he could, if he had chosen, have obtained a good title in the manner provided for by the Act. Here the defendant could have obtained a valid mortgage under the Act, but has failed to do so. At the utmost he can only allege that he has a claim based upon a personal contract with the registered owner of the shares. He not only has no charge given in the manner provided for by the Act, but he has no charge by any document at all. Therefore the defendant, in advancing his money, has not placed himself in the position which he would have occupied if he had taken care to ensure protection by following the provisions of the Act; and I think that it is very important that such matters should be dealt with upon the lines indicated by the provisions of the statute. It is said that the plaintiffs have so acted as to hold out Hine as being in such a position as enabled him, without following the provisions of the Act, to create a charge on the plaintiffs' shares, by merely promising to give a charge upon them to the defendant, so as to defeat the plaintiffs' title, unless

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they pay the defendant off. Certain cases have been cited to us which I do not propose to discuss, because the broad view which I take in this case is, that the only effect of the fact that persons beneficially interested in shares in a ship allow another person to be on the register, as legal owner, is that they thereby place him in such a position that he can defeat their rights, as between them and third parties, by a transfer of the shares in the manner provided for by the statute, but cannot otherwise infringe those rights. Of course there may be cases in which the beneficial owners have done something more than allow another person to be registered as legal owner, either by way of direct communication with the person claiming as transferee from the registered owner, or otherwise, upon which that person is entitled to rely; but in this case the only thing upon which the defendant can rely is the fact that Hine was allowed by the plaintiffs to remain on the register as the owner of the shares. It would, I think, be a startling proposition to say that this mere fact should enable him to defeat the rights of persons who had properly allowed him to be placed on the register for purposes for which they were entitled to do so. I am very much disposed to think that the object of the legislation contained in the Merchant Shipping Act, 1894, was that the beneficial owner who allows his shares in a ship to be registered in the name of another person should be bound in the event of any disposition of those shares by that person in the manner provided for by the Act, but not otherwise, unless there has been some further conduct by the beneficial owner which clearly gives rise to an equity against him. The result is that, in my opinion, the judgment of Bigham J. ought to be varied by reversing that portion of it which declares the defendant entitled to a charge on the plaintiffs' shares in the ship.

FLETCHER MOULTON L.J. I am of the same opinion. The action is by the plaintiffs, as the beneficial owners of shares in a certain ship, claiming a declaration that an alleged mortgage of those shares to the defendant to secure a sum of 4000*l.*, which had been registered, should be declared to be a nullity and should be expunged from the register. So far as that

claim is concerned, the action turned out to be really an undefended action, and judgment was given accordingly, declaring the alleged mortgage to be a nullity and ordering it to be expunged from the register; but the learned judge, no doubt desiring to settle as far as possible all points in controversy between the parties, allowed the defendant to set up something in the nature of a counter-claim, namely, that he had an equity to a charge upon the shares by way of security for repayment of an advance of money which he had made, not to the plaintiffs, but to the firm of Hine Brothers.

The only question contested before us was whether the defendant had made out his right to such a charge. I do not think that this question presents any considerable difficulty, when once the legal considerations which bear upon it are disentangled from the complications of fact involved. In my view, at the time when the transactions took place out of which this action arises, Wilfrid Hine was a bare trustee for the plaintiffs of the shares in question. He had, no doubt, placed himself upon the register in respect of them, as he was, as legal owner of them, entitled to do, but he had no beneficial interest in the shares. That being, in my opinion, his position, as to which I shall say more hereafter, money was subsequently borrowed by his firm under the circumstances which have been mentioned, and the transaction no doubt imported an agreement by him to give a mortgage of the shares of which he was the registered owner as a security for the money so borrowed. In fact no such security was ever given, for the document which was intended to be a mortgage of the shares was a mere nullity. All the circumstances which rendered it a nullity were known to Holman, the defendant's agent, so that there can be no question of any estoppel in the defendant's favour as to the character of that document. Consequently, we must take it that the promise to give a security on these shares was never carried out. The situation is therefore this: the cestui que trusts are entitled to call upon their trustee for a reconveyance of the trust property: the trustee has promised to give a charge upon that property to somebody else, as a security for money advanced by him, and has not carried out that promise. The promisee, in order to get a charge, would

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have to come to the Court, and claim specific performance of the promise; and, as specific performance of it would involve a breach of trust on the part of the trustee, the Court would not grant it. The registered owner, therefore, of the shares remains a bare trustee of them for the plaintiffs, and is bound to reconvey to them. These considerations, in my opinion, decide the case.

The defendant's counsel has endeavoured to bring the case within certain equitable doctrines, the effect of which, on proper occasions, is that an equity subsequent in point of time will be put in a position of priority in point of law to an equity prior in point of time, and even, in certain special cases, to the legal title. But in the cases in which this has been done there has, I think, always been something in the nature of negligence on the part of the owner of the equity prior in point of time. Here, in my opinion, there is no room for the suggestion that the cestui que trusts were guilty of any negligence. A person is entitled to leave his property, whatever it may be, in the name of a trustee. A vast amount of property in this country must be in the names of trustees. The fact that shares in a ship stand in a person's name on the register does not in any way negative the possibility of his being a trustee for others in respect of those shares. The importance, for commercial reasons, of rendering the title to ships and shares in a ship given by the person who is registered as owner indefeasible has led the Legislature to enact that such a person, whether beneficially interested or not, shall have an absolute power to give a good title by way of sale or mortgage to a purchaser or mortgagee, not having notice of any defect in his title (though he may thereby be committing a breach of trust), provided he does so "in manner in this Act provided." Therefore, as it appears to me, a beneficial owner who allows his shares in a ship to stand in the name of a trustee runs one risk, and one only, namely, that the trustee, in breach of his trust, may avail himself of the statutory means of effectually transferring, either by way of charge or sale, a part or the whole of the property in those shares. To that risk the plaintiffs in this case exposed themselves, but their trustee never did so transfer the shares; and the consequence is that they are not, in my opinion, affected by

the fact that for a time their interests were in peril to the extent that, if he had followed the method prescribed by the Act, he could have alienated their property from them.

The defendant's counsel endeavoured to meet the difficulties in which he found himself by the suggestion that this case must be dealt with on principles applicable to agency. It is necessary to consider what he meant by "agency" in this suggestion. Did he mean that there was an actual agency by virtue of an authority given to Hine to act on behalf of the plaintiffs, or did he mean that there was such conduct on the part of the plaintiffs as made Hine their ostensible agent to perform acts such as he did perform, when he promised to give security upon the shares, so as to make those acts binding on them as principals?

With regard to the first of these suggestions I am of opinion that Hine was in no sense an actual agent for the plaintiffs, but was a bare trustee. It is true that, at the time when the transfer of these shares was made to him as trustee for the plaintiffs, there was an authority given to him to dispose of them in a particular way. At that time it was intended to form a company to hold the shares. The transfer to him was to enable them to be transferred to that company when formed, and there was unquestionably then an actual agency for that purpose. But, long before any of the events happened in which the defendant was concerned, that purpose had wholly and for ever failed; and the consequence was that that agency had come to an end. Nothing, as it appears to me, could have been done with the shares by Hine, as agent for the plaintiffs, excepting by a fresh authority given; so that, in my opinion, there was no actual agency of any kind existing at the time when the transaction with the defendant took place, but Hine was a bare trustee for the plaintiffs.

Then it is suggested that he was an ostensible agent. Now, for the purpose of considering whether there was an ostensible agency, all matters which never came to the knowledge of the person dealing with the alleged agent may be disregarded, because in such cases the question is whether the person alleged to have been an "ostensible" agent has been held out to

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the person who dealt with him as being an agent by some act or acts done or permitted by the alleged principal. The consequence is that the authority originally given to deal with the shares, which subsequently became of no effect by reason of the failure of the project for forming a company, may be put aside altogether, because it is not suggested that the defendant ever heard of its existence. The only fact, therefore, which can be put forward as a basis for the suggestion that there was an ostensible agency is that the shares stood in the name of Hine. Now anything that I can say on this subject has already been much better said by Lord Cairns in the case of *Shropshire Union Railways and Canal Co.* v. *The Queen* (1), in the House of Lords, in the passage which was referred to by Farwell J. in *Rimmer* v. *Webster*. (2) The owner of shares in a ship does not hold another out as his agent by transferring the shares to him, so that they stand in his name. It is quite consistent with that fact that he is a bare trustee of the shares. There is no negligence, and no implied holding out of anything beyond the fact that the beneficial owner of the shares has for his own purposes invested another, as he is entitled to do, with the legal ownership of the shares. The result is, no doubt, that, in manner provided by the Merchant Shipping Act, the person so invested with the legal ownership can deal with the shares, and, if he does so, the beneficial owner will be bound by his action; but, apart from that, no implication of agency whatever can be based upon the mere fact that the shares stand in his name; and there is, as I have said, no other fact in this case known to the defendant upon which the suggestion of an ostensible agency on the part of Hine can be based. For these reasons I agree that the appeal should be allowed.

FARWELL L.J. I agree. In my view this is a mere question of conflicting equities. The legal estate in the plaintiffs' shares in the ship is outstanding in W. Hine. The blank transfer signed by him was, according to the decision in *Hibblewhite* v. *McMorine* (3), which was approved of by the House of Lords in

(1) L. R. 7 H. L. 496. (2) [1902] 2 Ch. 163, at p. 170.
(3) (1840) 6 M. & W. 200.

Société Générale de Paris v. *Walker* (1), a mere nullity, and therefore had no operation in point of law; although, on the true view of the circumstances, I apprehend that, as between W. Hine and the defendant, there is a contract to give a mortgage of the shares, on which the former would be liable to the latter in damages, and which, if the former were the beneficial owner, he would be compelled specifically to perform. In dealing with a question of conflicting equities, we start with the maxim that prima facie an equity prior in time is better in law. The equity which is prior in time can only be displaced by reason of some act or default of its owner, by which the person setting up the subsequent equity has been induced to act to his detriment. I think that, in this particular case, the direction to Hine to convey the shares transferred to the company, when formed, may be disregarded entirely. It adds nothing to the statutory power of conveyance. It is simply a direction to the trustee, who, as registered owner, has the statutory power, as to the mode in which he is to execute it in the particular event of the company being formed. The project for forming that company fell through long ago; and to my mind the case rests solely on the position of the registered owner under the Merchant Shipping Act, 1894, and raises, therefore, a question of general importance under that Act. As has been pointed out by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen* (2), the mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, and given him the title deeds, or the securities, or other indicia of title, does not justify any one in assuming that the person to whom such transfer is made is the beneficial owner. If the trustee does, in fact, deal with the property, and convey the legal ownership to a bona fide purchaser or mortgagee for value without notice, the cestui que trust has to bear the loss. If such a subsequent purchaser or mortgagee does not get the legal estate it is because he has not taken those precautions which the law allows him in order to protect himself from all risks; and he cannot set up the apparent ownership of the trustee as evidence of any misconduct or negligence on the part of the beneficial owner, because it is in

(1) (1885) 11 App. Cas. 20. (2) L. R. 7 H. L. 496.

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accordance with the usages of mankind that the legal estate in property should be conveyed to, and the indicia of title deposited with, trustees, and no other member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred. To my mind the present case is a stronger one than that before Lord Cairns. There the legal owner was apparently, on the face of the documents, the beneficial owner, and there was nothing whatever to indicate the possibility of a trust. In the present case the trustee held in accordance with the provisions of the Merchant Shipping Act, 1894, s. 56 of which provides that "no notice of any trust, express, implied, or constructive, shall be entered in the register book, or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration." It is obvious in such a case that a person dealing with the registered owner knows, or must be taken to know, that he may be, and very likely is, a trustee. The Act does not say that the registered owner is to have all the powers of a beneficial owner, or is to be deemed to be the beneficial owner; it merely gives him power to sell or mortgage in the way pointed out by the Act, namely, by a bill of sale, which is a deed. Then s. 57 contains provisions as to the way in which equitable interests are to be regarded. We are therefore relegated to the ordinary doctrines of equity in considering equitable claims to shares in a ship standing in the name of a registered owner. Then what is there here which can be deemed to amount to a suggestion to the defendant that W. Hine was the beneficial owner of the shares, or to an invitation to deal with him on that footing? There is nothing but the fact that he was on the register. That fact is perfectly consistent with his being a trustee. The Act has enabled a person dealing with a registered owner to protect himself fully by following the provisions of the Act, namely, by taking a transfer in the manner therein provided, and getting it registered. This, unfortunately for himself, the defendant

failed to do. Therefore he has recourse to equity; but the plaintiffs, who own a prior equity in point of time, say that they have done no wrong, and been guilty of no negligence; that they have merely done what many owners of shares in a ship do, namely, put their shares in the name of a trustee; that the Act gives such a trustee, when registered, the power to sell or mortgage the shares in a certain way, namely, by deed, but they trusted to Hine's not doing anything in contravention of their rights; that, if he had sold or mortgaged by deed, they would have been defenceless as against a subsequent bona fide purchaser or mortgagee for value, but, inasmuch as he did not, and the defendant has chosen to neglect the safeguards which the Act provided, he has no reason for complaint against them. It appears to me that the argument for the plaintiffs is unanswerable.

Mr. Scrutton has relied on my judgment in *Rimmer* v. *Webster*. (1) That case was one of agency, but, as the agent had also obtained the legal estate, I dealt with it first on the ground of agency, and then on that of trusteeship. On pp. 172, 173, I dealt with the question of agency, and held that the mere fact that the legal estate had for convenience been transferred to the agent did not prevent the application of the usual doctrines of agency. Then I dealt with it on the ground of trusteeship, upon the footing of the well-known case of *Rice* v. *Rice*. (2) The observations which were relied upon by the defendant's counsel in this case were directed to the question of agency, not of trusteeship, and were not intended to apply to the case where trustees under wills or settlements hold property either on trust for, or with power of, sale: such persons are trustees, not agents; and, if they deposit the deeds or stock or share certificates with, or in any other way seek to give an equitable charge to, a banker or any one else in breach of trust, and that banker or other person does not take the precaution of getting a legal transfer, his claims will be postponed to those of the cestuis que trustent, because, as already stated, persons who transfer land, or stocks or shares, into the name of a trustee on trust for sale only do that which is in accordance with the common usages of mankind. The equity of the cestui que trust would prevail over that

(1) [1902] 2 Ch. 163. (2) (1853) 2 Drew. 73, 83.

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of the banker or other person in the case which I have put, and any cestui que trust could get an injunction to restrain a transfer of the legal estate to such a banker or person, if he applied for one before such transfer had taken place. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis, for Lightfoot & Lightfoot, Maryport.*

Solicitors for defendant: *Holman, Birdwood & Co.*

E. L.

C. A. 1908 *May* 29.

[IN THE COURT OF APPEAL.]

YANGTSZE INSURANCE ASSOCIATION *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

Insurance (Marine)—Warranty against Contraband of War—Persons not Contraband—Breach of Warranty.

Semble, the term "contraband of war," in its natural sense, and in the absence of special circumstances, or of something in the context pointing to another meaning, is applicable to goods only, and not to persons; and therefore the transport of military officers of a belligerent State as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance.

Judgment of Bigham J., [1908] 1 K. B. 910, affirmed.

APPEAL from the judgment of Bigham J., reported [1908] 1 K. B. 910.

The action was by assured against underwriters on a policy of reinsurance.

The facts, which are fully stated in the report of the case in the Court below, may, for the purposes of this report, be sufficiently gathered from the judgment of the President.

J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants. Their arguments and the authorities cited by them were, in substance, the same as in the Court below.

Scrutton, K.C., and *Leck*, for the plaintiffs, were not called upon to argue.

SIR GORELL BARNES, PRESIDENT. The facts of this case are fully stated in the judgment of the learned judge in the Court below, and it is not necessary that I should recapitulate them at length for the purposes of my judgment. The question which arises upon those facts is whether the defendants, who underwrote a policy of reinsurance effected by the plaintiffs, are freed from liability upon that policy by reason of the breach of a warranty therein contained. The plaintiffs had underwritten a policy for 18,000*l.* on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. That policy contained a warranty "not to carry cargo other than kerosene oil," and covered "the risk of capture." The policy underwritten by the defendants was described as "being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk." The policy of reinsurance contained the following provision: "Warranted no contraband of war on basis of cable dated 31 October, 1904, copy of which attached hereto." The copy of telegram attached was of a telegram sent from the office of the plaintiffs at Shanghai to the plaintiffs' London office, which ran as follows: "S.S. *Nigretia*.—Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee." At the time a state of war existed between Russia and Japan. The steamer sailed on the insured voyage to Vladivostock, and was, while on that voyage, captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by a Japanese prize court. The judgment of that Court found that two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that those two persons were Russian officers, but, on the other hand, the Japanese Court found that there was

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no proof that they were ignorant of the fact, and the Court held that the ship must be confiscated as having been engaged in transporting these persons. The plaintiffs paid on the original policy as for a total loss, and then brought the action on the reinsurance policy, claiming to be indemnified by the defendants. On the trial Bigham J. gave judgment for the plaintiffs.

To my mind, this case does not really raise the broader question as to the meaning in general of the term "contraband of war." In my view the particular warranty relied upon was inserted in the policy with the knowledge on the part of both parties and on the basis that they were dealing with a cargo of kerosene oil, there being a warranty in the original policy "not to carry cargo other than kerosene oil"; and the copy telegram was attached for the purpose of making it clear what the warranty with regard to that cargo was intended to be, the effect of it being that the defendants undertook the reinsurance with a warranty as to the cargo which only protected them to the extent indicated by the telegram. That warranty, in my opinion, related only to the cargo, and therefore there was no breach of the warranty in the sense in which I read it.

This view, if correct, would reduce any observations on the broader question as to the meaning in general of "contraband of war" to the position of obiter dicta; but, as that question has been discussed before us, I think it desirable that I should state my opinion with regard to it. The defendants' counsel has cited as being in his favour certain passages from text-books, in which the authors were dealing with the general topic of the effect of breaches of neutrality by reason of a ship carrying persons or things which she ought not to carry, and the carriage of which exposes her to the risk of capture and condemnation. But it is remarkable that no case has been cited in which, in the Courts of this country, persons have ever been spoken of as being "contraband of war." Going back to old days, one of the leading cases on the subject is *The Jonge Margaretha* (1), which was a decision of Lord Stowell, and is included in Tudor's Leading Cases on Mercantile Law, 3rd ed. 981. The learned editor of that work, in discussing the question what is "contraband

(1) (1799) 1 C. Rob. 189.

of war" in his note to that case, begins by saying that "one of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides is that which forbids them to supply any of them with what is called contraband of war; under which term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes." I think it will be found, on looking at the numerous cases in which Lord Stowell and other learned judges have dealt with the question what is and what is not "contraband of war," they all relate to things, and not to persons. In my opinion, when one is dealing, as in this case, with a commercial contract made between commercial men with regard to insurance, prima facie the correct view to take is that the expression "contraband of war" is used in the primary sense in which it is generally used, namely, as applicable to goods. That this is the natural meaning of the term appears to be borne out by the definition of "contraband" given in the dictionaries. For instance, in the Oxford English Dictionary, edited by Murray, vol. 2, p. 912, I find the following meanings given under the word "contraband": "1. Illegal or prohibited traffic: smuggling." "2. Anything prohibited to be imported or exported: goods imported or exported contrary to law or proclamation: smuggled goods." "3. (In full *contraband of war*.) Anything (*esp.* arms, stores, or other things available for hostile purposes) forbidden to be supplied by neutrals to belligerents in time of war, and liable by the law of nations to be captured and confiscated." There are other meanings there given, the effect of the whole being, as it seems to me, to shew that the term "contraband" in its primary and proper sense applies only to goods. Having regard to the considerations which I have mentioned, namely, that no case has been cited in which in an English Court the term "contraband" has been used with regard to a person, and that the term is defined in well-known dictionaries as only relating to goods, and also to the fact that in the works of some text-writers, particularly Hall on International Law, pp. 640, 673, the term "contraband of war" is used as relating only to goods, and the expression "analogues of contraband" is employed by the author when dealing with the carriage of persons, I have

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no hesitation in saying that, in my opinion, if the decision of this case depended on the broader question which was dealt with by Bigham J., it ought to be decided in accordance with his view of the matter. It is not without interest to notice that, in the declarations with regard to contraband which were made at the commencement of the Russo-Japanese war by the Japanese and Russian Governments respectively, and which are to be found set out in the work of Messrs. F. E. Smith and N. W. Sibley on "International Law as interpreted during the Russo-Japanese War," the lists of matters declared to be contraband appear to be confined to things, and not to include persons. Again, in the Declaration appended to the Treaty of Paris, which was signed in 1856 by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, respecting maritime law in time of war (1), the term "contraband" is used in such a way as to indicate that only articles or goods were referred to, and not persons. I may perhaps be going beyond what is necessary for the decision of this particular case in making these observations on the broader question, but, in my opinion, on the terms of this particular policy and also on the broader ground to which I have alluded, there was no breach of the warranty given, and the appeal must therefore be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and have only a very few words to add on the second point. The phrase "contraband of war" is, in my view, naturally applicable to goods, and not to despatches or persons; but I should be prepared to consider the question whether it might not be used in a wider sense, if there were anything to shew that such a use of it was common among commercial men, or in commercial documents, or was recognized in the Courts of law. It has, however, been admitted that, though the subject of contraband of war has been discussed in many cases by eminent judges, there is no instance in any reported case in which the term has been applied otherwise than to goods. It appears to have been applied to persons by

(1) See Hertslet's Commercial Treaties, vol. x. p. 547; Wheaton's International Law, 4th ed. p. 803; E. A. Whittuck, International Documents, London, 1908, p. 1.

one or two text-book writers only, in passages where it is apparent from the context that it was not being used in a strict sense.

FARWELL L.J. I agree. In my opinion the term "contraband of war" is, in its primary meaning, applicable only to goods; and I do not think that the defendants' counsel meant to dispute that this was so. His contention was that the term had acquired a secondary meaning. The general rule of construction is that words used in documents must receive their primary signification, unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, shew that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning quoad hoc: *Simpson* v. *Margitson*. (1) There is no question here of anything in the nature of a trade usage, or of surrounding contemporaneous circumstances; and I can see nothing whatever in the context to qualify the primary meaning of the term "contraband of war." This was a trading vessel which was intended to carry cargo, and the parties were not contracting with any idea that persons would be carried. On both the grounds referred to by the learned President, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) (1847) 11 Q. B. 23, at p. 31.

E. L.

C. A.
1908
May 27;
June 3.

[IN THE COURT OF APPEAL.]

SADD *v.* GRIFFIN.

Practice—Solicitor—Bill of Costs—"Disbursements"—Counsel's Fees—Fees not paid before Delivery of Bill—Taxation—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

For the purpose of taxation of a solicitor's bill under the Solicitors Act, 1843, "disbursements" means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, *e.g.*, fees to counsel, which have not been paid before its delivery, must be disallowed.

APPEAL from an order by Jelf J. at chambers refusing to direct a review of the taxation of costs.

An action had been brought by the plaintiff, a solicitor, for the sum of 208*l.* 6*s.*, alleged to be the balance due upon a bill of costs and disbursements which had been delivered by him to the defendant. Proceedings having been commenced under Order XIV., judgment was by consent signed in the action for 185*l.* The defendant subsequently took out a summons asking that the bill should be taxed and that the judgment should only stand for such amount as should be found due upon taxation; and an order was accordingly made for taxation of the bill. The total amount of the bill was 301*l.* 2*s.* 6*d.*, which included items in respect of counsel's fees amounting to 54*l.* 6*s.* 6*d.* Those fees had not been paid when the bill was delivered, or when the order for taxation was made. The taxing Master adjourned the taxation to give the plaintiff an opportunity of paying them, which he did; and the Master ultimately allowed the items, and gave his certificate, taxing off the bill the sum of 46*l.* 7*s.* 8*d.* The defendant applied to Jelf J. for a review of the taxation, on the ground that the items ought not to have been allowed, but, as above mentioned, the learned judge refused the application.

C. A. Russell, K.C., and *R. J. Willis*, for the defendant. Counsel's fees can only be included in a solicitor's bill as "disbursements," and "disbursements" can only mean payments which had been actually made at the time when the bill

was delivered: *Holmes* v. *Penney*. (1) After a bill has been delivered under the Solicitors Act, 1843, s. 37, it cannot be altered, or a fresh bill delivered, even with the consent of the client: *Davis* v. *Earl of Dysart* (2); *In re Thompson*. (3) [They also cited *In re Remnant* (4); *In re Grant, Bulcraig & Co.* (5); *In re Catlin* (6); *In re Walters* (7); *In re Heather* (8); *In re Carven*. (9)

Rawlinson, K.C., and *D. McGarel Hogg*, for the plaintiff. The word "disbursement" does not necessarily mean a sum which has been actually paid. It may include sums which will have to be paid, and the necessary protection is given to the client, if the practice is not to allow such sums upon taxation till they have been actually paid. In many cases it would be practically impossible for a solicitor actually to pay, before delivering his bill, all the items for which he will have to make disbursements on account of the client, as, for instance, charges for printing and stationer's charges, in respect of which the practice would be for the printer or stationer only to deliver his bill half-yearly. It appears that the Master followed the usual practice in this case.

C. A. Russell, K.C., in reply.

Cur. adv. vult.

June 3. FARWELL L.J. read the following as the judgment of the Court (Fletcher Moulton L.J. and himself):—

This is a taxation under the Solicitors Act, and to such a taxation considerations different from those applicable to a party and party taxation apply. As the Master of the Rolls in *Davis* v. *Earl of Dysart* (2) said, "The bill of costs, as between party and party, is always susceptible of being added to or varied, after it has been brought into the office. In this respect, it is quite different from a bill of costs taxed under the statute, where an alteration cannot be made as against the client, except with his consent, after the bill has been brought in for taxation. In cases of taxation of

(1) (1854) 9 Ex. 584.
(2) (1855) 21 Beav. 124, at p. 132.
(3) (1885) 30 Ch. D. 441, at p. 448.
(4) (1849) 11 Beav. 603.
(5) [1906] 1 Ch. 124.
(6) (1854) 18 Beav. 508.
(7) (1845) 9 Beav. 299.
(8) (1870) L. R. 5 Ch. 694.
(9) (1845) 8 Beav. 436.

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costs as between party and party, the bill of costs is analogous to a mere state of facts, and is a claim by one party against another party to a suit, and it may be amended, in any way and at any time, before the taxation is concluded."

The Act of 1843 imposes on a solicitor the duty of sending to his client a signed bill of his fees, charges, and disbursements. Until he has done this, and a month has elapsed, he can bring no action to recover them. If and when he does sue, he sues on the bill so delivered and no other. If the client pays without taxation, he pays the bill so delivered, and if he wishes for taxation before payment, it is the bill so delivered that is sent to taxation. There is but one bill, and its delivery is a condition precedent to payment.

The Act requires the bill to include "disbursements," that is (I quote the Oxford English Dictionary, edited by Murray, vol. 3, p. 409), "That which has been disbursed: money paid out: expenditure." It is clear that the money must have been paid in order to support an action on the bill. See *Holmes* v. *Penney* (1), where Parke B. says: "We never entertained any doubt that an attorney cannot charge for counsel's fees which have not been paid. In point of law they are gratuities; and as he has not paid them, with respect to them he is not a farthing out of pocket." It is equally clear that a solicitor cannot properly accept payment of the bill unless he has paid the alleged disbursements, and, if he did so, he would run considerable risk of being struck off the rolls: see *In re A Solicitor* (2); and it is settled beyond controversy that the solicitor is, for the purposes of taxation, bound by the bill that he has delivered and cannot alter it without the leave of the Court or the consent of the party. See *In re Thompson* (3), where Cotton L.J. says: "It has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or

(1) 9 Ex. 584, at p. 588. (2) (1883) 27 Sol. J. 683.
(3) 30 Ch. D. 441, at p. 448.

threatened, sending in another bill which they knew could stand taxation. The rule has been carried so far that even where objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items, the Court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended."

The solicitor has claimed in the bill in this case 54*l.* odd for fees to counsel which, by delivering his bill, he alleges to have been paid, and he is bound by that statement. When it is shewn to be incorrect, the items cannot be allowed, for such allowance would enable him to turn an amount which when the bill was delivered was a liability not enforceable at law into an actual payment.

I have consulted one of the senior taxing Masters, but those officers are not unanimous in their opinion on the practice. I have, therefore (and I am expressing the views of my learned brother as well as myself), expressed my opinion on principle. There is but one bill intended by the Act, whether for the purpose of payment without action or taxation, or for the purpose of action or for the purpose of taxation. It is necessary, in the interests of honesty, and in order to remove temptation, that all disbursements should be made before the bill is paid; and it is equally necessary if an action is to be brought. In the present case the solicitor has actually attempted, by proceedings under Order xiv. and in bankruptcy, to obtain payment of a bill containing a large amount of disbursements which he had never made, proceedings which he must have supported by affidavits which cannot have been true; and in cases of taxation it is equally necessary, for the reasons which I have stated above.

We hold, therefore, that for the purpose of taxation under the Solicitors Act "disbursements" means actual payments before the delivery of the bill, and that any sums claimed in the bill as disbursements and not paid before its delivery must be disallowed.

Appeal allowed.

Solicitors for plaintiff: *Sadd & Stollard.*

Solicitor for defendant: *George Castle.*

E. L.

C. A.
1908
May 21;
June 4.

[IN THE COURT OF APPEAL.]

JOHNSON *v.* KEARLEY.

Stock Exchange—Principal and Agent—Right of Broker to Indemnity from Client—Contract made by Broker not in accordance with Authority given.

The defendant on various occasions instructed the plaintiff, a country stockbroker, to effect for her purchases and sales of stocks and shares in the usual way through brokers on the London Stock Exchange. On receipt of her instructions, the plaintiff effected various purchases and sales of stocks and shares in a manner of which the following transaction is an example. The defendant having instructed the plaintiff to buy certain American railway shares for her, the plaintiff gave an order for the purchase of the shares to a firm of brokers on the London Stock Exchange, between whom and himself there was an arrangement that in such cases they should deal at a "net" price for the shares, i.e., a price arrived at by adding to the purchase price such sum as the London brokers might fix as their remuneration for the transaction. The London brokers thereupon bought the shares from a jobber, and sent a bought note to the plaintiff charging "98½ net" for the shares, the price at which they bought from the jobber not being disclosed. The plaintiff then sent a bought note to the defendant, charging her 98½ for the shares (without adding the word "net") plus a commission of 7*s.* 6*d.* and 1*s.* for the stamp. It appeared that the amount added by the London brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by the plaintiff against the defendant for a balance alleged to be due to him in respect of the above-mentioned transactions:—

Held by Sir Gorell Barnes, President, and Fletcher Moulton L.J. (Farwell L.J. dissenting), that the contracts effected by the plaintiff, being contracts, not made through the London brokers as agents, but made with them as principals, were not in accordance with the authority given to the plaintiff by the defendant, and therefore he was not entitled to indemnity from the defendant in respect of them; and, consequently, that the action was not maintainable.

Judgment of Bucknill J., ante, p. 82, affirmed.

Appeal from judgment of Bucknill J., reported ante, p. 82.

The nature of the action and the facts are stated in the report of the case in the Court below and sufficiently appear from the judgments.

Foote, K.C., and *W. T. Lawrance*, for the plaintiff. The defendant authorized the plaintiff to effect contracts for her for

the purchase and sale of shares through brokers on the London Stock Exchange, and she must have known that the London brokers would require remuneration. The plaintiff did in fact effect such contracts with jobbers, and the obligation to indemnify him against them arose as soon as he had, through the London brokers, effected the contracts. The fact that, in subsequently rendering an account of the transactions, the London brokers and the plaintiff only mentioned a lump sum in the bought notes, and did not specify what portion of it was the price paid to the jobber and what was the London brokers' remuneration, could not have the effect of depriving the plaintiff of his right to indemnity. If the defendant had required particulars of the way in which the total charge was made up, she would, no doubt, have been entitled to them; and, if there was any excess in the London brokers' remuneration, she would be entitled to have that set right. But in fact the plaintiff does not appear to have been really damnified at all by the way in which the transactions were carried out. *Stange* v. *Lowitz* (1), upon the authority of which the learned judge below appears to have decided this case, is distinguishable, because there the plaintiffs seem not only to have charged a broker's commission, but to have added on something as well to the price at which the shares had been bought through a member of the Stock Exchange.

McLeod, K.C., and *J. A. Hawke*, for the defendant. The plaintiff, in order to entitle himself to indemnity from the defendant, must shew that he made such contracts as he was authorized by her to make, and that he passed on to her the real contracts for the purchase of the stock or shares. The contracts in respect of which the plaintiff is claiming indemnity in this action are not such contracts as he was authorized to effect, and therefore he is not entitled to the indemnity which he claims. The result of what he did was, in substance, not to effect a contract for the defendant with a jobber through brokers on the London Stock Exchange, but to effect a contract between himself and the London brokers for the purchase of the shares at a net price, which included an unknown profit to the London

(1) (1898) 14 Times L. R. 468.

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brokers, fixed by themselves, on the particular transaction, a contract which the defendant never authorized. It may be that in the present case the London brokers did not charge more than they would have been entitled to, if the defendant's instructions had been carried out in a regular way, but it is obvious that the mode of doing business adopted in this case might lead to grave abuses. The price passed on by the plaintiff to the defendant was not the real price at which the shares were bought from the jobber, but another price which included a profit to the London brokers, the amount of which the defendant had no knowledge of, and on which the plaintiff charged her commission.

Foote, K.C., in reply.

Cur. adv. vult.

June 4. SIR GORELL BARNES, PRESIDENT, read the following judgment:—This is an appeal by the plaintiff from the judgment of Bucknill J., given on March 28 last, in favour of the defendant, with costs.

The action was brought by the plaintiff to recover from the defendant a sum of 549*l.* 17*s.* 4*d.*, alleged in the statement of claim to be the balance due from the defendant to the plaintiff in respect of purchases and sales by the plaintiff as a stockbroker on behalf of the defendant. The defendant in her defence did not admit that the plaintiff made the purchases and sales on her behalf, and pleaded that the transactions were within the provisions of 8 & 9 Vict. c. 109, s. 18. The defendant also counterclaimed for the return of a certain certificate for thirty shares of the Cason Gold Mining Company, Limited, and a blank transfer thereof, or for their value, to which the plaintiff replied, taking issue on the defence and pleading to the counter-claim that the said share certificate and blank transfer were handed to him by the defendant as part security for the payment by the defendant of the balance due to the plaintiff from the defendant. Nothing was said on the appeal with regard to the counter-claim, so I presume that it practically depends upon the result of the claim.

The facts which gave rise to the claim may, so far as material,

be stated as follows. The plaintiff in February, 1907, commenced business as a stockbroker on his own account at Plymouth. The defendant was a widow residing at Plymouth, and carrying on business there under the title of the "American Teeth Company." On February 8, 1907, the plaintiff sent out a printed circular, one copy of which appears to have been sent to the defendant. This circular stated that the plaintiff had made arrangements with a London firm of authorized brokers which would secure for his clients the advantage of having all business transacted upon the very best and safest terms. The defendant, who, as I gather from the evidence, had little or no experience of Stock Exchange transactions, was minded to attempt to make some money by purchases and sales on the Stock Exchange, and the balance is claimed to be due from her to the plaintiff in respect of the purchases and sales of a variety of stocks, of the merits of which, so far as appears in the evidence, the defendant would seem to have had no knowledge, but probably hoped, as do so many foolish people without adequate experience, to make money in this way.

The plaintiff's first transaction with the defendant since he started as a broker on his own account was in the month of May of last year, and from that time onwards a variety of purchases and sales of stocks and shares were made, and the manner in which this was done was as follows. The plaintiff received his instructions either from the defendant or from her manager; and she knew they would have to be carried out by brokers on the London Stock Exchange, and her authority to the plaintiff was to have them carried out in this manner. The plaintiff then passed the orders on to a firm of stockbrokers named Lumsden & Co., who were members of the Stock Exchange, and the business which was done was done by them on the Stock Exchange by purchases and sales from and to jobbers, and then the London firm sent bought or sold notes to the plaintiff, and he sent bought or sold notes to the defendant. No commission was charged by the London firm to the plaintiff, but he charged commission to the defendant. The actual arrangement between the two brokers was stated in his evidence by Mr. Evans, a member of the firm of Lumsden & Co., as follows. He stated that his

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firm had acted for the plaintiff as brokers since February, 1907; that the transactions between them were carried out according to the rules of the Stock Exchange in every instance, and contract notes were always sent to the plaintiff; that, before a contract note was sent, his firm made a contract with a jobber according to the Stock Exchange rules, and that the plaintiff settled with them every fortnight, and had paid them. The most important part of his evidence, upon which, to my mind, the case mainly turns, was that the arrangement between the plaintiff and Lumsden & Co. was that they should charge the plaintiff a price to include their remuneration; that they arrived at their remuneration according to how the bargain appeared; sometimes they did business for nothing; that their intention was that the business should appear well done, and that they should charge their commission accordingly. All the bought notes between Lumsden & Co. and the plaintiff had the words "net price"; and Mr. Evans stated that "net price" meant purchase price plus their remuneration, and that there was no fixed scale of remuneration; that their habit with the plaintiff on receiving his order to buy was to go into the "House," get a price and wire him the price if he bought it "net," and then send a purchase note. In giving a concrete case as an illustration he gave one of July 29, when the plaintiff bought 500*l.* Grand Trunk Ordinary at $28\frac{13}{16}$. He (Mr. Evans) said that Lumsden & Co. bought of Oates, a jobber, at $28\frac{3}{4}$, that is to say, $28\frac{12}{16}$, with an added $\frac{1}{16}$ for commission, and "sold" for $28\frac{13}{16}$; that he had other examples, and that the plaintiff had added his commission to the defendant. Further, that the plaintiff would not pass on to the defendant the actual price at which Lumsden & Co. bought from the jobber. The plaintiff in his evidence said with regard to the net price that he did not know what Lumsden & Co. made; that "net" meant that all the charge for commission was his own; that he did not know what they (Lumsden & Co.) did, and that they must explain that. He also said that he paid the London brokers every fortnight regularly; that they charged him a net price without commission; that the defendant instructed him to buy for her on the Stock Exchange at the price of the day; that he could not say if he always charged her

such prices, and that he always charged her what Lumsden & Co. charged him; that he suspected it was the market price and they probably got their profit; and he told the defendant's manager that all he wanted out of the business was his commission, and that he did not know if the London brokers had jobbers or not. I cannot find in the evidence that any provision was made in the arrangement aforesaid as to any definite limit of the amount to be added in order to arrive at the "net price."

I may take one complete illustration from the documents which were put in of how the business was done. This was treated in argument as a test illustration. On May 3, 1907, the defendant's manager instructed the plaintiff to buy for fortnightly settlement ten shares of the Atchison, Topeka, and Santa Fé Railway Company at best. This order was sent on by the plaintiff to Lumsden & Co., who in their turn bought from the jobber the ten shares at $98\frac{7}{16}$, and then sent to the plaintiff a bought note as follows: "Bought for account of F. Johnson, Esq., subject to the rules and customs of the London Stock Exchange, ten Atchison, &c., shares at $98\frac{1}{2}$ net, 197*l.*, for account May 15." The plaintiff sent a bought note to the defendant in the following terms: "Bought for account of Mrs. Kearley, subject to the rules and customs of the London Stock Exchange, ten Atchison, &c., shares at $98\frac{1}{2}$, 197*l.*; commission, 7*s.* 6*d.*; stamp, 1*s.*—197*l.* 8*s.* 6*d.* For settlement May 15."

The defendant's main defence was that the transactions were gaming transactions within the statute, and that question was disposed of at the trial before the learned judge and a jury, who found in favour of the plaintiff thereon. It had been agreed that the learned judge should decide any other question, with liberty to draw inferences of fact, after the jury had found upon the question which was left to them. The learned judge afterwards heard the case on further consideration and gave judgment for the defendant. The substantial point on which he held in favour of the defendant was that the plaintiff had not proved that he had carried out his client's instructions, and that the moneys that he had paid were paid within the authority with which she had invested him.

Now to my mind this appeal raises no new question of law,

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but depends entirely upon the facts of the case, that is to say, in effect, upon whether the inference which the learned judge has drawn from the materials placed before him was correct or not. The only propositions of law which it is necessary to have clearly in mind in order to consider the facts are, first, that a principal is bound to indemnify his agent in respect of all payments which may be made by the latter in the due course of his employment, and of course it follows that the agent seeking to recover from his principal for payments made must prove that he has made the payments, and that they were made in respect of transactions which he was authorized by his principal to enter upon; secondly, that an agent is not entitled to make a secret profit out of his agency. With regard to the latter principle, there is no suggestion whatever in this case that the plaintiff has made anything out of these transactions except the commission which he shewed on the face of the bought notes sent to the defendant that he was charging her, nor was there any suggestion that he has in any way made any secret profit or acted in any way intentionally with any impropriety. The sole question is whether he has in fact carried out the defendant's instructions through his agents in London in such a way as to make contracts for her such as were authorized by her to be made. Now this to my mind depends on this question of fact, namely, whether the brokers in London, who were acting on the arrangement which they had made with the plaintiff, but of which the defendant was not informed by the plaintiff and was entirely ignorant, really made the purchases and sales with the jobbers as agents of the defendant acting through the plaintiff, with whom alone they actually dealt, although the defendant was principal behind him; or whether the effect of the arrangement between them and the plaintiff, and the manner in which that arrangement was carried out, was such that the brokers in London were not acting strictly as agents, but were dealing so as to make a price at which they could sell to the plaintiff. In my opinion the evidence which was given by Mr. Evans, together with that of the plaintiff, was such that the learned judge might draw the inference which he did, and I am not satisfied by the arguments of the appellant that he has drawn a wrong conclusion which ought to be overruled; for

to my mind that evidence amounts to this, that the plaintiff dealt with the London brokers, and, although he left them to make contracts with the jobbers, I think that the contracts made with the jobbers were intended by the London brokers and the plaintiff to be contracts on which the London brokers would make a price to the plaintiff, that price depending on whether the terms on which they were able to deal with the jobbers were advantageous or otherwise. In effect this amounts to the brokers in London selling to the plaintiff, and not acting as agents for him and, through him, for the defendant. I am very much struck indeed with the statement made in the evidence of Mr. Evans, as it appears in the notes of the evidence, when he is dealing with the concrete case of the Grand Trunk Ordinary shares; for he actually says that he added $\frac{1}{16}$ for commission and "sold" at the price mentioned in his evidence. That is in effect what the London brokers were doing. They were selling at a price and not buying on commission, though the price at which they sold was fixed by what they considered a reasonable profit, depending on their view of how the bargain appeared. The result is that, whereas the defendant employed the plaintiff to buy for her at the market price through London brokers as her agents, the plaintiff has not in fact carried out those instructions, for by arrangement with the London brokers he has allowed them to deal so that they could make a price with the jobber on the one hand and make another price with him on the other, which is not carrying out the transactions in London in such a way that the London brokers acted merely as agents for the country broker.

It was urged for the plaintiff that the commission charged to the defendant in the case taken as an illustration was only about $\frac{3}{8}$ per cent., and the extra charge made by the London brokers was only $\frac{1}{16}$, and that, as these two added together still were below the $\frac{1}{2}$ per cent. usually charged, this shews that the London brokers were acting as agents on commission, and that the defendant has in no way suffered by the transaction; and it may be that, if all the other cases of purchases and sales are examined, it will be found that not more than $\frac{1}{2}$ per cent. has been charged by the plaintiff and the other brokers together, so that it may be said that the defendant has no substantial grievance at all in the

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case; but that is not the point to be decided. The point is that which I have already stated, namely, whether these contracts were such as were in fact authorized, and, when the matter is examined and criticized, it seems to me that the plaintiff fails to make out his case. He does not prove contracts made on his client's behalf on the London Stock Exchange, but by the peculiar arrangement with him he proves contracts of sale to himself by the London brokers. Even if any transactions were found in which no extra charge by the London brokers was made, this would not necessarily shew a purchase as brokers, for it would be done under the aforesaid arrangement with the expectation of making a profit on other transactions, and might still be at a "price made" under the arrangement. The case turns mainly on the arrangement which has led to the inference of fact drawn by the learned judge, and the mere fact of sending notes purporting to be bought notes would not alter this.

I notice that Bucknill J. expressed his regret at the necessity of his judgment being in favour of the defendant, and I agree with him. The plaintiff appears from the notes of the evidence to have made some strong observations in the defendant's presence on her conduct. She seems to have been a person who wished to speculate, and, after finding out that she had lost, she has turned round and taken advantage of every point which ingenuity could raise to defeat the plaintiff's claim, although, if he and his agents had acted in the ordinary way, the loss would in that case have been practically the same as it was. But, although the defendant's case is without merits, we can only deal with legal rights and liabilities, and I feel the very great importance and necessity of holding agents to carrying out strictly the instructions which they receive, especially in transactions such as those under consideration. If the manner in which these transactions in this case were carried out in London were supported, it seems to me that a very loose and mischievous mode of doing business might result, for when it is considered that Stock Exchange quotations often fluctuate with great rapidity, and that a particular stock on a particular day may be quoted at prices continually varying, if a broker were to make a bargain during the day with a jobber at a price which was at that moment the best price the broker could

get, and then afterwards were to send forward a bought note to another agent acting on behalf of a client at a price fixed by the London broker according to how the bargain with the jobber appeared, it seems to me that there might be the greatest possible temptation, if the price had been lower at the time of the purchase from the jobber than it became later in the day, to make a price which would mean a very substantial difference and make a very handsome remuneration. It is not suggested that that has been done in this case. As far as I can make out, the brokers in London have charged nothing more than left them with a very slight profit, which, when added to the plaintiff's commission, did not exceed ½ per cent.; at the same time it is perfectly easy to see that, if the transactions are not carried out with strict regularity by agents, shewing the price at which they buy or sell and the commission that is charged by each person who is to charge commission, it is very easy for occasions to arise in which persons might have opportunities of not acting with that propriety which is necessary between agents and their principals.

I should also add with regard to the action of the London brokers in the present case that they appear to have dealt with the plaintiff as principal, and that they did intimate in their bought note to him that they were buying net, and they had made the arrangement with him as to how they were to act, and, if the dispute were between him and them, it would be difficult for him to complain, because he knew how the transactions were being carried out; and, even if they must be taken to have known he was acting for a client, it may be that they would assume that he would pass the price on to the defendant in the same terms as he received it, namely, "net," and explain to her the method of dealing, which he did not do. I do not, however, need to consider anything as to the position of the London brokers as between them and the plaintiff, for the question arises here between the plaintiff and the defendant, who did not know how the transactions were carried out in London, and was entitled to assume that they were carried out on the ordinary and simple lines on which contracts should be made by brokers, and that the commission charged was all she had to pay for

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commission, which any one looking at the bought note sent her would probably assume was shared between the brokers. Had the plaintiff told the defendant of his arrangement with the London brokers and passed on the contract notes in the terms in which they were received, he might probably have avoided his present difficulty. The defendant did not do anything to ratify the mode in which the transactions were carried out, for we were informed that it was not until the trial that she and her advisers had full knowledge of the matter. For these reasons, in my opinion, the judgment of the learned judge should be affirmed with costs. With regard to the two cases referred to in the learned judge's judgment, I do not think it necessary to refer to them at length, as the decisions only turn upon the application of recognized principles to the particular facts.

FLETCHER MOULTON L.J. read the following judgment:—In this case the plaintiff is a broker at Plymouth employed by the defendant in the purchase and sale of shares, and he bases his claim on the usual contract of indemnity that exists between principal and agent. He sets forth in his writ the amounts which he alleges he has paid in respect of contracts made by him for the defendant in the course of his employment, and an account of the sums received by him on her account in connection with these contracts, and the commission due to him in respect of his acting as her agent in respect of them. The defendant traverses all these allegations, and originally set up the defence that any contracts made by the plaintiff were wagering contracts, but that issue has been found against her by the jury. The onus is, of course, upon the plaintiff, and to establish his claim to an indemnity he must shew two things—first, that the alleged contracts were in fact made by him on behalf of the defendant; and, secondly, that those contracts were within the scope of his authority. To decide the issues thus raised it is, therefore, necessary to ascertain the precise nature of the employment of the plaintiff, and then to consider what he in fact did.

In substance there is no difference between the parties as to the nature of the plaintiff's employment. Both parties agree that the plaintiff was employed as a stockbroker and was

authorized to make contracts of purchase and sale of the shares specified by the defendant; but it is also agreed that it was the common intention of both parties that these contracts should be made through the medium of the London Stock Exchange in the ordinary way. As the plaintiff was not himself a member of that Stock Exchange, and as that fact was perfectly well known to the defendant, it follows that, for the purpose of making such purchases and sales, it was necessary for him to employ a broker on the London Stock Exchange, and he was entitled so to do on the defendant's behalf. This also is not only admitted, but relied on by both parties. It is, therefore, not necessary to examine the evidence in support of these propositions of fact. They have, indeed, formed throughout the action the very foundation of the plaintiff's case, as may be seen from the following extracts from an affidavit which is before us and which was sworn by him in connection with his application for judgment under Order XIV. He states: "My business is that of a broker only, and, as stated in the said circular" (referring to a circular sent to the defendant), "I conduct it by buying and selling through a well-known firm of brokers on the London Stock Exchange, who buy and sell for me all the stocks and shares in which I deal for my clients." And in an affidavit filed by him on that occasion, and made by a member of the firm of London stockbrokers in question, the latter states: "My said firm act as brokers in London for the above-named plaintiff and buy and sell stocks and shares on the London Stock Exchange upon his instructions. I have examined the account, &c., and I say that bona fide contracts for the purchase and sale respectively of the whole of the stocks and shares included in such account have been entered into by my said firm as stockbrokers on the instructions of the said plaintiff, according to the rules and regulations of the London Stock Exchange, at the prices stated in such account." Furthermore, the circular referred to, which was sent to the defendant by the plaintiff prior to these transactions, contained these words: "The satisfactory working arrangement I have made with a prominent and well-known London firm of authorized brokers, who are in constant touch with the varying movements of the stock and share market, will

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secure for clients the advantage of having all business transacted upon the very best and safest terms."

It is to my mind hardly necessary to say that this authority to employ a broker on the London Stock Exchange to carry through the proposed purchases and sales only authorized the plaintiff to enter into an ordinary and proper contract of brokerage with such broker on behalf of the defendant in respect of each such transaction. What the plaintiff in fact did was as follows. He had an arrangement with a firm of brokers whereby, for instance, when directed by him to purchase shares on the London Stock Exchange, they gave him a "net price"—that is to say, they bought at such price as they could arrange and added thereto such sum as they thought proper, and charged him the price so arrived at. This so-called commission was fixed by no rule and was not in any case known to the plaintiff; and the broker who was called admitted that it varied with the price at which the shares had been bought—that is to say, if they were bought at a low price, they would put on a higher commission, and, perhaps, if bought at an unfavourable price, the commission might be lower; in other words, to use a phrase which is not unknown, I regret to say, in some branches of mercantile transactions, they seem to have put on the real price what they thought it would bear. The evidence as to this is perfectly clear, and the facts, as I have stated, were not denied by counsel for the appellant. The plaintiff, in his evidence, says as follows: "I sent her orders to my London agents, of the London Stock Exchange. They sent me a contract always in usual form. No commission charged to me, but I charged a commission to the defendant. London brokers agreed to deal with me on those terms, at a 'net' price. I don't know what they made. 'Net' means that all I charge for commission is my own. I don't know what they do. They must explain that." And later on, in cross-examination, "Defendant instructed me to buy for her on Stock Exchange at price of day. I can't say if I always charged her such prices"; and then, "I charged her what Lumsdens charged me, so I suspect it was the market price. They probably got their profit"; and on re-examination he says, "I didn't know if brokers had jobbers or not." A

member of the London firm was called on behalf of the plaintiff as a witness, and he said, "Arrangement between plaintiff and us was that we were to charge him a price to include our remuneration. We arrived at our remuneration according to how the bargain appeared. Sometimes we do business for nothing. Our intention is that the business should appear well done, and that we should charge our commission accordingly. 'Net' price means purchase price plus our remuneration. No fixed scale of commission." And in cross-examination he said, "Plaintiff never passes on to defendant the actual price at which I bought from the jobber." On examining the bought and sold notes sent by the London stockbrokers to the plaintiff it is absolutely clear that the plaintiff had no actual information as to the price of the shares or the amount added thereto in order to arrive at the so-called "net" price. It is true that these bought and sold notes have no commission on the face of them, and the price is called a "net" price. But these notes were never passed on to the defendant, but in lieu thereof the plaintiff sent to her bought and sold notes made out in the plaintiff's name in which the price is the same as that appearing in the notes sent to him, but the word "net" is omitted, and there is an item for commission in the usual way and the usual charge for the stamp.

It is therefore undeniable that the contract made by the plaintiff with the London broker was that he should name him a price, not the price at which the shares were bought plus a known charge for commission, but a different price arrived at by adding to the actual price of the shares such sum as the broker thought fit, the amount of which was never communicated either to the Plymouth broker or to the client.

Speaking for myself, I have no doubt whatever, first, that such a contract as that made by the plaintiff with the London broker is not a contract of brokerage, or, in other words, that it is incompatible with the relation of broker and principal; and, secondly, that, even if by special arrangement such a contract could be made with a broker without his ceasing to be a broker, it would not be an ordinary contract of brokerage, and would, therefore, not be within the authority of the plaintiff to make on behalf of the defendant.

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Taking the first of these points, the power to add on to the price of the article bought an arbitrary sum is a taking of profit and not a commission, and is compatible only with a sale and resale. It is absolutely inconsistent with the duty of an agent for purchase, inasmuch as it is the essential idea of a purchase through a broker or any other agent of the kind that the whole benefit of the purchase should go to the principal, and that the sole interest of the agent should be in the commission allowed him by his principal. The office of a broker is to make privity of contract between two principals, and this is utterly incompatible with making a contract at one price with the one and a corresponding contract at another price with the other, and pocketing the difference, the amount of which is unknown to either.

Secondly, even if by a stretch of language one could regard the employment of the London broker as an employment of him as a broker, it could not, in my opinion, by any stretch of language be considered an ordinary contract of brokerage, such as the plaintiff would by reason of his employment as a broker by the defendant be entitled to make on her behalf. The nature and incidents of the employment of a broker on the London Stock Exchange by a customer are perfectly well known to the Courts, and differ toto cœlo from such a contract as was made in the present case. The broker returns to the customer the actual price made and charges him commission. But a suggestion that it is in accordance with the customs and conditions of the London Stock Exchange for a broker to add on to the price a sum at his own discretion, varying with the price at which he has made the bargain, without communicating the amount to his client, has never, to my knowledge, been made in these Courts, and would, in my opinion, be a gross libel on the London Stock Exchange. In this case it may have been well known to the plaintiff that the London broker was adding on a so-called commission, the amount of which was concealed from him, but to my mind that makes the matter worse. The London broker was fully aware that his Plymouth correspondent was in business as a stockbroker, and that presumably, therefore, the purchases and sales effected by him were on behalf of his clients. They

must, therefore, have known that it was impossible for him to do his duty to his clients if he was allowing the purchases on the London Stock Exchange purporting to be made on their behalf to be made at a so-called commission unknown in amount and variable at the will of the London broker, so that the true prices paid for the shares could never be known to the ultimate client. What happened may easily be conceived. The plaintiff, as I have said, returned to the defendant bought notes in the ordinary form, giving the price at which the shares purported to have been bought, then the commission, then a charge for the cost of the stamp. The price, therefore, inserted for the shares was not the actual price, but the price swollen by the concealed and arbitrary addition to which I have referred. I have not the slightest doubt that the defendant understood each such document as I should have understood it, and as, in my opinion, it can alone be understood, namely, that the actual purchase price of the shares on the London Stock Exchange was that given, and that the commission included all the expenses of effecting the bargain—that is to say, the total commission received by all intermediaries between the defendant and the jobber from or to whom the shares were actually bought or sold. As, however, it is not necessary for the decision in this case to dwell upon the considerations that naturally arise from such conduct, I shall say nothing further as to the behaviour of the plaintiff in the matter, although in my eyes it furnishes abundant matter for comment.

I ought to add that it was strongly urged upon us that the so-called commissions charged by the London stockbroker were not exorbitant when regarded as commissions. It may be so, although I can find in the evidence no trace of any agreement as to any limit of the amount to be added on by the London brokers to obtain this so-called "net price." But, however this may be, I confess that such considerations do not weigh with me in determining the rights of the parties. A practice by which the broker's client has not the benefit of the actual price obtained by the broker, but only of so much as the broker chooses to allow, is open to

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the gravest abuse. On the Stock Exchange securities may in the course of a day, or even of a much shorter time, vary in price, and a broker who considers that he has no duty to report the actual price of the transaction to his client, or to give him the whole benefit of the transaction he has carried out on behalf of his principal, is always under the temptation of making a profit by the transaction at the expense of his customer, and often may do so without running the least risk of detection. Such behaviour on the part of a broker appears to me to come under that class of cases dealt with in the case of *Robinson* v. *Mollett* (1), so that not even proving a usage on the market would make the principal liable, because it would be a usage which really changes the character of the broker and the nature of the dealing. If that be so, the question whether or not, in the particular instances which go to make the account sued on in the present case, the London broker has in fact abused his opportunities in the sense of making exorbitant profits appears to me to be wholly irrelevant to the question we have to decide. The contract which the plaintiff made with the London broker was one by which he might make profits, and, therefore, was not a contract of brokerage, whether or not any or exorbitant profits were in fact made.

I will add only a word or two as to the second issue, the burden of which is also on the plaintiff, namely, that the contracts in respect of which indemnity is sought were in fact made by him. In my opinion the contracts reported to the defendant, and which formed the basis of this action, were not in fact made by the plaintiff. Seeing that it is common ground that the purchases were to be made on the London Stock Exchange through a London broker, the contract notes sent by the plaintiff to the defendant which contained the alleged contracts represented contracts which never were in fact made. The prices at which they represent the shares to have been bought were not the true prices, but were in all cases higher. I am therefore of opinion that the plaintiff has failed to support this issue also, but, inasmuch as the contracts, even if made, were in my opinion wholly outside his authority, the point becomes immaterial. For these

(1) (1875) L. R. 7 H. L. 802.

reasons I think that the judgment of the learned judge was right and that this appeal should be dismissed.

FARWELL L.J. read the following judgment:—In this case I regret that I have been unable to come to the same conclusion as my brothers, although I entirely agree with the propositions of law enunciated by them, and I feel bound to express my own opinion.

Any one who employs a broker on the London Stock Exchange to buy or sell stocks or shares for him does so, in the absence of express contract, on the terms of paying the usual commission, or, if there be none in the particular market, a reasonable commission; and any one who employs a country broker to buy or sell through a London broker does so, in the absence of express contract, on the terms of paying the country broker his usual or reasonable commission and of indemnifying him against that of the London broker. The employer is, of course, entitled to know the amount charged by both brokers in every case, but, inasmuch as he knows or must be taken to know that some commission is paid, he cannot complain of non-disclosure of the amount if it be within the limits of the broker's implied authority to charge, i.e., if it be usual or reasonable. If he has no further information, he has only himself to thank for not asking for it: *Baring* v. *Stanton* (1) is a good illustration of this.

In the present case the defendant instructed the plaintiff, who is a Plymouth stockbroker, and who had notified her by circular that he was willing to act for clients by employing brokers on the London Stock Exchange, to buy stock for her on the Stock Exchange; and he thereupon instructed his London brokers, and they bought from jobbers in the usual way, and sent him the usual bought note, except that they charged no commission eo nomine, but added a small sum (in some cases nothing at all) to the price as remuneration, the amount not being specified, but being added to the price under the term "net." The plaintiff then sent to the defendant a bought note charging her the same sum as he had paid the London brokers, but omitting

(1) (1876) 3 Ch. D. 502.

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the word "net," and adding a small sum expressed to be for his own commission. It is not suggested that the plaintiff made any profit beyond his own declared commission, or that he did not pay the full amount to the London brokers, or that the latter did not buy from jobbers, or that they charged any improper or unreasonable amount, or that either of them intended that the London brokers should act otherwise than as a broker; and it is admitted that in no case has the amount charged to the defendant in respect of the remuneration of both brokers exceeded or even equalled the amount that either one of them alone would have been entitled to charge as the usual commission.

On these facts it is contended, and the learned judge has drawn the inference, that the London broker was not acting as broker at all, but as principal. He has not disbelieved the plaintiff or the London broker—indeed, he has expressed his sympathy with the plaintiff and his dissatisfaction with the defendant's conduct; but, notwithstanding this, he has drawn an inference from the documents and circumstances of the case adverse to the plaintiff. The grounds for drawing such an inference are as available for the Court of Appeal as for the judge of first instance, and I therefore feel no hesitation in dealing with it. Further, no defence on this ground is pleaded, and the point, on which evidence of custom might have been called by the plaintiff, was sprung upon the plaintiff at the trial. The contention, as I understand it, is this. The employment of a broker on the Stock Exchange necessitates not only the purchase by him from a jobber on the client's behalf, but also the charge of a brokerage commission; in this case no such commission is charged eo nomine; therefore the broker cannot have been acting as broker, but must be regarded as a principal. As my learned brothers as well as Bucknill J. think this is correct, I have great diffidence in adhering to my own opinion. But I am utterly unable to follow the reasoning as applied to the facts of this particular case. If a question arises whether a man is acting as broker or principal, and the notes express that he "sells to" and does not "buy for" the other, or if it appears that he adds to the jobber's price such sum as he thinks the deal will bear, irrespective of any limit of the usual brokerage commission, or if he does not

in fact buy from a jobber on behalf of his principal at all, I should have no hesitation in holding him to be dealing as a principal and not as a broker. The charges in excess of the proper brokerage would prevent him from setting up that he is a broker, for he has then no excuse for his overcharges, and cannot be allowed to set up his own wrong-doing. But no such considerations apply to a case like the present. Take the cases where nothing is charged. The broker "buys for" his employer and charges him nothing. I cannot bring myself to say that the latter can repudiate the bargain and leave the agent to bear the loss, because he has done his work for nothing. The same considerations apply to all the cases where a smaller sum than the proper brokerage commission is charged. The buyer is in no difficulty in asserting that he bought as broker, for he has no overcharge or misconduct to explain away. He has merely charged less brokerage than he was entitled to charge, and he has not charged it in the name of brokerage at all. If the principal chooses to inquire, he will be told the details; if he does not, he has only himself to blame; but in both cases, as there is no overcharge, he has nothing to complain of. I fail to see why, because in some cases dishonest brokers might unduly load the bargains of careless clients, an honest broker should suffer from his own and his London broker's generosity, and that a defendant who has been characterized as dishonest throughout should be allowed to escape her just liabilities.

It is said that there is no evidence of any custom to charge "net," as was done by the London brokers; but the plaintiff had no opportunity of calling such evidence, and no evidence is necessary to prove that London brokers are entitled to commission; and, when it is once conceded that the amount charged under the "net" arrangement is always less than such commission, it is obvious that no custom is required to enable the broker to charge less than he is entitled to. It becomes then a mere matter of non-disclosure of an immaterial circumstance, namely, the amount by which the commission which the London broker was entitled to charge was reduced by him for the benefit of his client. The case relied on of *Stange* v. *Lowitz* (1) has

(1) 14 Times L. R. 468.

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nothing to do with facts such as I have stated. It was simply an illustration of the principle that an agent to buy or sell cannot as principal sell to or buy from his own principal. There is nothing new in this doctrine, of which *Rothschild* v. *Brookman* (1) is one of the earliest illustrations. In my opinion the appeal ought to succeed.

Appeal dismissed.

Solicitors for plaintiff: *Law & Worssam, for Bickle & Wilcocks, Plymouth.*

Solicitor for defendant: *H. Dobell, for J. P. Dobell, Plymouth.*

E. L.

1908

May 26.

MATTINSON *v.* BINLEY.

Bread—Sale otherwise than by Weight—Bread Act, 1836 (6 & 7 *Will.* 4, c. 37), *s.* 4.

Although it is not necessary in order to constitute a sale of bread by weight within the meaning of s. 4 of the Bread Act, 1836, that the bread should be weighed at the very instant of sale, it must be weighed at a time before and with reference to the sale.

The respondent weighed a loaf which then weighed 2lbs., but placed the loaf aside for consumption in his own household. Twelve hours later the loaf was, by mistake, sold by the respondent's brother-in-law, acting on his behalf. At the time of the sale the loaf was not weighed, and in fact was $1\frac{1}{2}$ ozs. under 2 lbs., the loss in weight being due to evaporation which had taken place since it was weighed twelve hours previously:—

Held, that the loaf had not been sold by weight within the meaning of s. 4 of the Bread Act, 1836, inasmuch as there had been no weighing with reference to the sale, and that the respondent had therefore committed an offence under the section.

Cox v. *Bleines*, [1902] 1 K. B. 670, explained.

CASE stated by justices for the county of Northampton.

An information was laid under s. 4 of the Bread Act, 1836, by the appellant Mattinson charging that the respondent Thomas Binley on November 30, 1907, at the parish of Kettering, then being a baker out of the city of London and the liberties thereof

(1) (1831) 2 Dow & Cl. 188.

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beyond the weekly bills of mortality and ten miles of the Royal Exchange, unlawfully did sell a certain loaf of bread otherwise than by weight, the loaf not being such bread as is usually sold under the denomination of French or fancy bread or rolls.

At the hearing before the justices the following facts were proved or admitted :—

The appellant was a duly appointed inspector of weights and measures for the division of the county in which Kettering is situated, and the respondent was a baker carrying on business in Kettering.

About 6.30 P.M. on November 30 a woman, acting as agent for and at the request of the appellant, entered the respondent's shop and asked for "a loaf of bread." A cottage loaf was handed to her by the respondent's brother-in-law, and the woman paid $2\frac{1}{2}d.$ for it, such being the usual price of a half-quartern loaf. The loaf was not weighed in the presence of the woman before it was sold. The appellant thereupon entered the shop and weighed the loaf of bread. The loaf was $1\frac{1}{2}$ ozs. under 2 lbs. The respondent came into the shop whilst the appellant was weighing the bread, and the appellant told him the bread was $1\frac{1}{2}$ ozs. under 2 lbs.

The loaf had been taken out of the oven at about 6.30 A.M. on November 30. The respondent had then weighed the loaf separately, and it was a 2 lb. loaf, but being a bad shape it had for that reason been put on one side by the respondent for consumption in his own house, and it had been afterwards sold by mistake by the respondent's brother-in-law, acting on behalf of the respondent. At the time of the sale, which took place about twelve hours after the loaf had been weighed, the loaf weighed $1\frac{1}{2}$ ozs. under 2 lbs., and the loss in weight was due to evaporation after the loaf was weighed and before it was sold.

The justices were of opinion that upon the above facts there was no evidence upon which they could lawfully find that the respondent had sold bread otherwise than by weight within the meaning of s. 4 of the Bread Act, 1836 (1), because he had in fact

(1) Bread Act, 1836, s. 4: "And be it enacted, that from and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively

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weighed the bread before it was sold to the woman, and they accordingly dismissed the information.

The question for the opinion of the Court was whether the justices could lawfully have found that the sale above described was a sale of bread otherwise than by weight within the meaning of s. 4 of the Bread Act, 1836.

R. D. Muir, for the appellant. Weighing the loaf twelve hours before the sale was too remote. There was therefore no sale by weight. Although bread may have been weighed before the time of sale, if it is in fact light at the time of sale there is not a sale by weight: *Cox* v. *Bleines* (1); *Welch* v. *Cutler* (2); *Jones* v. *Huxtable*. (3)

G. W. Powers, for the respondent. Whether there is a sale by weight or not is a question of fact. The weighing need not be at the time of sale. The requirements of s. 4 of the Bread Act, 1836, are complied with if the bread is weighed previously to its being sold. The effect of the cases which have been cited is that, if it is found that the weight of the loaf is less than that which was said to be its weight at the time it was sold, a presumption arises that it was sold otherwise than by weight. In the present case that presumption is rebutted because the bread was in fact weighed before it was sold: *Mitton* v. *Broke* (4); *Jones* v. *Huxtable* (3); *Cox* v. *Bleines*. (1)

[The Bread Act, 1836, s. 7, was also referred to.]

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beyond the said limits by weight; and in case any baker or seller of bread beyond the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct: Provided always, that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

The "limits aforesaid" are "the city of London and liberties thereof, and beyond the weekly bills of mortality and ten miles of the Royal Exchange."

(1) [1902] 1 K. B. 670.
(2) (1905) 69 J. P. 149.
(3) (1867) L. R. 2 Q. B. 460.
(4) (1869) 33 J. P. 821.

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LORD ALVERSTONE C.J. I am of opinion that the justices have misunderstood the law applicable to this case. It is possible that they may have had my judgment in *Cox* v. *Bleines* (1) brought to their attention, and if they understood the sentence contained in it, "either before it is sold or exposed for sale or else if necessary in the presence of the customer," to mean that it is sufficient if the bread is weighed at any time whatever before it is sold, they may have been misled. I do not say it is necessary that the bread which is sold should be weighed at the very instant it is handed over. In my opinion the true rule is that which I intended to express in *Cox* v. *Bleines* (1), following the judgment of Blackburn J. in *Jones* v. *Huxtable*. (2) He said: "I do not think it is obligatory on the seller to weigh at the time of sale; but unless the loaf were weighed then or shortly before, inasmuch as it was proved that bread soon loses weight, there would be strong evidence to shew that the seller was not selling by weight." Shee J. said: "The statute does not compel a seller to weigh the bread at the time of sale, but in order to sell by weight it was incumbent on the appellant to ascertain before selling that what is understood as a 4 lb. loaf was a 4 lb. loaf." Shee J. added another test to that given by Blackburn J., namely, that the loaf must be weighed at a time when the seller could practically say it was a 4 lb. loaf which was handed over. Lush J. went rather further and said it must be weighed at the time of sale. I do not understand that to mean at the actual moment of sale, but that it must be weighed under such circumstances that it can be taken to be a weighing with reference to the sale. In the present case all that was before the justices was that at 6.30 in the morning, when the loaf was taken out of the oven, it was weighed and found to weigh the proper weight, 2 lbs. Then it was left for twelve hours—strangely enough, not being intended to be sold—and then sold. The justices thought that was not a sale otherwise than by weight, as the seller had in fact weighed the bread before it was sold, meaning thereby twelve hours before it was sold. In my opinion there was no evidence that there was a sale by weight in the sense of there being a weighing with reference to the sale. In so far as the word "before" was used

(1) [1902] 1 K. B. 670. (2) L. R. 2 Q. B. 460.

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in my judgment in *Cox* v. *Bleines* (1) I do not think it ought to have been misunderstood. I did not mean any time before the sale, but at a time before and with reference to the sale. I think in this case the justices ought to have convicted; and the case must go back for them so to deal with the matter.

DARLING J. I am of the same opinion. I think that to sell an article by weight means to sell it by its weight at the time of the selling, and not by what was ascertained by weighing to have once been the weight of it. Whether a weighing which took place some time before the sale would suffice or not must, I think, depend to some extent on the nature of the article sold, as, for example, whether it was bread, or gold or marble. If gold or marble were sold the seller could reasonably say, "I weighed it only a week ago with a view to selling it, and when I sold it I sold it by the weight it had a week ago; and it is notorious that marble and gold do not vary in weight in such a time as that." But if the same argument be applied to bread, it is obvious that it is thoroughly fallacious; and what has been done in this case is to make use—innocently I think—of a weighing which was no kind of test of the weight of the article when it was sold, as being sufficient to prove a sale by weight. I agree that the appeal must be allowed.

SUTTON J. I agree with the judgment of the Lord Chief Justice.

Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. A. Millington, Northampton.*

Solicitor for respondent: *P. H. Webb, for T. Watson Wright, Leicester.*

(1) [1902] 1 K. B. 670.

J. E. A.

JONES *v.* SHERVINGTON.

1908
May 28, 29 ;
June 2.

Licensing Acts—Sale to Children—Prohibition of—Exceptions—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

The holder of a licence who sells or delivers intoxicating liquor to a person under the age of fourteen years in a corked and sealed vessel in a quantity of not less than one reputed pint, for consumption off the premises only, does not commit an offence under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, even though the intoxicating liquor is not of a kind commonly sold in a corked and sealed vessel; inasmuch as the effect of the exception contained in the section is to enable the licence-holder to so sell or deliver not merely intoxicating liquor which is ordinarily sold in a corked and sealed vessel, but any intoxicating liquor which is in fact in a corked and sealed vessel.

Case stated by a metropolitan magistrate.

An information was laid by the respondent Shervington, a sub-divisional inspector of the Metropolitan Police, under the Intoxicating Liquors (Sale to Children) Act, 1901, s. 2 (1), against the appellant Rebecca Jones, charging that she on January 27, 1908, being a licensed person within the intent and meaning of the Licensing Acts, 1828 to 1904, did unlawfully knowingly sell certain intoxicating liquor, to wit, one reputed pint of beer, to a person under the age of fourteen years, to wit, one Dolly Balmforth, aged nine years, for consumption off her licensed premises, the said intoxicating liquor not being such as is sold or delivered in corked or sealed vessels.

(1) Intoxicating Liquors (Sale to Children) Act, 1901, s. 2: "Every holder of a licence who knowingly sells or delivers . . . . save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty . . . ."

Sect. 5: "The term 'corked' means closed with a plug or stopper, whether it is made of cork, or wood, or glass, or some other material.

"The expression 'sealed' means secured with any substance without the destruction of which the cork, plug, or stopper cannot be withdrawn."

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Upon the hearing of the information the following facts were proved or admitted:—

The appellant was the licensee of the Black Horse public-house, 10, Bedfordbury, W.C.

On January 27, 1908, one Ellen Balmforth sent her daughter, a child aged nine years, to the Black Horse, and the child was provided by her mother with an empty bottle for the purpose of obtaining at the Black Horse one pint of beer for consumption off the premises.

The child was supplied by the appellant's barman with one imperial pint of beer, which he drew from a beer engine into a pint measure and then poured into the bottle, but before the beer was sold to her or the bottle containing the beer was delivered to her the barman securely corked and sealed the bottle within the meaning of s. 5 of the Intoxicating Liquors (Sale to Children) Act, 1901.

On behalf of the respondent it was contended that the appellant had been guilty of the offence charged against her in the information, as the intoxicating liquor sold and delivered to the child under the circumstances hereinbefore set forth was not within the exception specified in s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, as it was not such intoxicating liquor as is commonly sold or delivered in corked and sealed vessels within the meaning of the exception in s. 2, it not being bottled beer. *Farndale* v. *Dillon* (1) was relied upon in support of that contention.

On behalf of the appellant it was contended that the decision in *Farndale* v. *Dillon* (1) did not apply, and that upon the above stated facts the appellant was not guilty of any offence within the meaning of the Act of 1901.

The magistrate held, upon the authority of the above-mentioned case, that the appellant was guilty of the offence charged in the information and accordingly convicted her.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Avory, K.C., and *Forrest Fulton*, for the appellant. The magistrate, in convicting the appellant, acted upon a passage in the

(1) [1907] 2 K. B. 513.

judgment of Darling J. in *Farndale* v. *Dillon* (1), where he stated that the exception in s. 2 means such intoxicating liquors as are ordinarily sold in corked and sealed vessels. That was, however, a mere dictum, and not necessary for the purpose of deciding the question then before the Court; and, further, that view of the meaning of the exception is erroneous. The exception refers to such intoxicating liquors as are in fact sold or delivered in corked and sealed vessels. The object of the Act as shewn by the authorities was to prevent a child under the age of fourteen from abstracting the contents of a vessel of intoxicating liquor: *Brooks* v. *Mason* (2); *Mitchell* v. *Crawshaw* (3); *Macey* v. *McKenzie*. (4) The exception applies not only when the liquor is sold, but also when, though not sold, it is delivered in a corked and sealed vessel, which shews that it is not limited to a sale of such liquors as are customarily sold in corked and sealed vessels. If, therefore, on the particular occasion in question the intoxicating liquor is either sold or delivered in a vessel which is in fact corked and sealed, the case is brought within the language of the exception in s. 2 and no offence is committed.

Danckwerts, *K.C.*, and *Bodkin*, for the respondent. The view expressed by Darling J. in *Farndale* v. *Dillon* (1), which was concurred in by A. T. Lawrence J., is correct. In order to ascertain the objects of a statute its title must be looked at: *Reg.* v. *Cockerton*. (5) The title of this Act, "An Act to prevent the Sale of Intoxicating Liquors to Children," shews clearly what its object was, and s. 2, in order to carry out that object, first enacts a total prohibition of the sale of "any description of intoxicating liquor" to children. Then follow the exceptions, first, in the case of a sale or delivery at the residence of the purchaser, in which case it is not likely that the vessel containing the liquor would come into the hands of a child; and, secondly, in the case of "such intoxicating liquors as are sold or delivered in corked and sealed vessels." The absence from this latter exception of the words "of any description" is to be noted, and the use of the words "as are sold," with the change from the singular to

(1) [1907] 2 K. B. 513.
(2) [1902] 2 K. B. 743.
(3) [1903] 1 K. B. 701.
(4) (1903) 67 J. P. 251.
(5) [1901] 1 K. B. 726.

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the plural, import the idea of common practice, and shew that the exception was only intended to apply to such liquors as are usually sold in bottles already corked and sealed. In the present case the bottle belonged to the purchaser, and therefore there was a sale immediately the beer was poured into the bottle, and consequently there was no sale in a corked and sealed bottle. The object the Legislature had in view was to make it as difficult as possible to sell intoxicating liquor to children.

Avory, K.C., in reply. The question as to when a sale technically takes place is immaterial for the purpose of construing the licensing statutes, inasmuch as the word "sale" is used in the popular sense. The title of the Intoxicating Liquors (Sale to Children) Act, 1901, is not "An Act to Prevent Children frequenting Public-houses," but "An Act to Prevent the Sale of Intoxicating Liquors to Children." Bottled beer is habitually sold by publicans and grocers. There is therefore nothing in the Act of 1901 to prevent a child buying a bottle of bottled beer. The Act of 1901 repealed the Intoxicating Liquors (Sale to Children) Act, 1886 (49 & 50 Vict. c. 56), which prohibited the sale of intoxicating liquors to children for consumption on the premises. The Act of 1886 was repealed because it was found that mere prohibition of the sale to children for consumption on the premises was not sufficient to prevent the children from drinking the beer out of an open jug or vessel while they were carrying it to the person by whom they were sent to fetch it. The whole object of the repeal of the Act of 1886 and the substitution of the Act of 1901 was to prevent the child drinking the beer in the public-house or on the way home without being detected, and the later statute therefore enacted that the bottle must be so sealed that the contents could not be abstracted without detection.

The words "as are sold" in s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, are not to be read idiomatically, nor ought the word "usually" to be inserted before the word "sold." The section can be reasonably construed without importing any additional word. In the present case the liquor was such intoxicating liquor as was sold in a corked and sealed vessel.

Cur. adv. vult.

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June 2. LORD ALVERSTONE C.J. read the following judgment: —This was an appeal against a conviction under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901. The facts, which are not in dispute, are that a girl nine years old was sent with a bottle to a public-house to fetch a pint of beer, and the barman of the appellant, the licensee, put a pint of beer into the bottle and then corked and sealed it, in accordance with s. 5. The question is whether under these circumstances the appellant was properly convicted. In my opinion this conviction cannot be supported. Sect. 2 creates two criminal offences—one on the part of the holder of the licence who knowingly sells or delivers, or allows any person to sell or deliver to a person under the age of fourteen years any description of intoxicating liquor except such intoxicating liquors as are sold or delivered in corked and sealed vessels; the other by a person who knowingly sends a child to a place where intoxicating liquors are sold or delivered for the purpose of obtaining any description of intoxicating liquor except as aforesaid. No question arises here under the second part of the section, though it has to be considered in connection with the arguments used before us. I am of opinion that there was no evidence upon which the appellant could properly be convicted. The statute does not prohibit persons under the age of fourteen years going on to licensed premises; what it does prohibit is their being supplied with intoxicating liquors, except such as are sold or delivered in corked and sealed vessels, and any one sending a person under the age of fourteen years to obtain liquors except such as are corked and sealed. It is suggested that the true construction of the words "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels" is such intoxicating liquors as are "commonly sold," and reliance was placed upon an expression in the judgment of my brother Darling in *Farndale* v. *Dillon*. (1) In that case the proceedings were against the parent who had sent his son to the public-house with a bottle, and the only point decided was that there was no evidence that the father sent the son to obtain liquors corked and sealed or in quantities of not less than one pint, and therefore the observations of my brother Darling were

(1) [1907] 2 K. B. 513.

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Lord Alverstone C.J.

not necessary for the decision. But in my opinion that construction cannot properly be put upon these words. I think the words mean such intoxicating liquors as are in fact sold or delivered must be corked and sealed. The words are not "sold *and* delivered," and the use of the word "or" in my opinion shews that the statute was intended to prevent the liquor being handed to a child otherwise than in a corked and sealed vessel. To construe the words as meaning such intoxicating liquors as are commonly sold and delivered would raise a question of great uncertainty and would make it impossible for a licensee to know what liquors he might properly sell. Such a construction would, I think, prohibit a man bottling off beer which was supplied to him in a barrel and then delivering that beer in corked and sealed bottles; in fact, the only construction which can properly be put upon the words is, in my judgment, that they prevent the licensee from selling such intoxicating liquors to a child unless they are delivered in corked and sealed vessels. The object of the statute, as was pointed out in many cases, was in my opinion to prevent liquor being sold to children otherwise than in corked and sealed bottles, and not to prevent children under fourteen from going to a public-house. This was the ground of the decision on which we held in *Brooks* v. *Mason* (1) that the licensee could be convicted even if he honestly believed that the vessel was properly corked and sealed. In the same way in *Mitchell* v. *Crawshaw* (2) it was pointed out by my brother Channell that the test was that the bottle must be so secured that the liquor could not be got at without detection. It was suggested on behalf of the respondent that the object of the statute was to prevent young children going to public-houses. This very desirable object may be the result of the statute, but when the statute is examined it cannot, in my opinion, be said to be the effect of the enactment so far as the criminal offences created by s. 2 are concerned. The latter part of the section contemplates children being sent to public-houses to fetch liquor in quantities not less than one pint in vessels properly corked and sealed. Moreover, this Act repealed the Act of 1886, which prohibited the sale of liquor to children under the age of thirteen for consumption on the premises. It

(1) [1902] 2 K. B. 743. (2) [1903] 1 K. B. 701.

follows that the Legislature considered that the protection of the corked and sealed bottle was sufficient. The respondent's counsel raised the further point that the offence was complete when the beer was put into the bottle, because, as he contended, the property then passed. This may be so if the technical question of when the property passed is considered, but in my opinion, for the purpose of dealing with offences under the Licensing Acts, we have to look at the object of the particular enactment and the whole transaction, and if the beer was never delivered to the child otherwise than in a corked and sealed bottle, it is immaterial whether in law the property passed at an earlier stage. I think this appeal must be allowed with costs and the conviction quashed.

DARLING J. read the following judgment:—I agree in effect with the Lord Chief Justice, although the language of the statute is to my mind so vague that more than one interpretation may reasonably be put upon it, as is sufficiently shewn by my brother Lawrence's agreement in the view I took in the case of *Farndale* v. *Dillon*.(1) Having now given further consideration to the matter, I cannot remain of the opinion that the intention of the statute is so narrow as I supposed when I gave my judgment in that case. To rightly understand the Act of 1901 I think it is necessary to have regard to the Act of 1886. That statute, The Intoxicating Liquors (Sale to Children), Act, 1886, dealt only with the case of selling to children on licensed premises liquor to be consumed by them; and it has for preamble these words: "Whereas it is expedient to protect young children against the immoral consequences resulting from their being permitted to purchase intoxicating liquor for their own consumption." The statute of 1901, bearing the same title, prohibits selling or delivering to children under the age of fourteen years, save at the residence or working place of the purchaser, for consumption by any person on or off the premises, any description of intoxicating liquor. That is the principal enacting part of s. 2. After that comes the exception. If the words alone be regarded, it might be argued that the liberty allowed by s. 2 of the

(1) [1907] 2 K. B. 513.

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Darling J.

Act of 1901 to sell liquors in open vessels to children at the homes or workplaces of those for whom they purchase shews that Parliament chiefly intended to keep young persons away from the public-house, but would allow children of any age to purchase, even for their own consumption, intoxicating liquors, provided they should do so at their residence or working place. For the statute of 1901 repeals that of 1886, which forbade the sale of intoxicating liquor to children under thirteen years for consumption on the premises, and then it makes such provision as I have stated. To my mind, therefore, more than mere construing is required to arrive at the true intention of Parliament as expressed in this Act. Any difficult writing is best understood by those who in reading it make judicious use of the imagination, and consider other works by the same author. Now the Act of 1901 has no preamble; but I imagine that its object, like its title, is the same as that of the Act of 1886. Remembering this, I approach the exception in s. 2, the meaning of which, and my former dictum concerning it, have given occasion for this case. The enactment that intoxicating liquors are not to be sold or delivered to children in less quantity than a reputed pint has in no way been explained; but it rather supports the contention which I accepted in *Farndale* v. *Dillon* (1), that liquors ordinarily put up and sold in bottles holding at least a pint were intended, and I think the language of the exception lends colour to this construction. But, having regard to the provisions of the Act of 1886, the mischief it designed to prevent, and its repeal by this Act of 1901, I arrive at the conclusion that the words "such intoxicating liquors as are sold or delivered in corked and sealed bottles" apply to liquors poured into bottles brought by children to the licensed premises, which liquors, being then bottled, corked, and sealed, straightway become "such as are sold or delivered" in corked and sealed vessels. I think, therefore, that I was mistaken when I adopted the view that the words meant such liquors as are sold in bottles provided by the vendor. Now, looking at both the statutes, I have come to the opinion that Parliament intended to allow children under fourteen to be sent to fetch intoxicating

(1) [1907] 2 K. B. 513.

liquors, probably for their parents' consumption, carefully placing a physical difficulty in the way of children who *en route* would help themselves to the beverages intended for other and older persons.

SUTTON J. read the following judgment:—The case of *Fielding* v. *Morley Corporation* (1) decided that the title of an Act is an important part of the Act. The words of the title of this Act are clear, and do not indicate in any way that its object was to prevent children from being on licensed premises. The question for decision must therefore depend on the construction of s. 2 of the Act. The words of the section in dispute are, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only." These words are not in themselves ambiguous, and there is nothing in the context or in the title suggesting that any meaning is to be given to them other than their ordinary meaning; I am not, therefore, at liberty to introduce any word among them, as, for example, "commonly" before the word "sold." Further, with respect to the words "sold or delivered" as distinguished from the words "sold and delivered," I think the former expression shews that the section is indifferent to the time when the property in the beer put into the bottles passed to the purchaser. On the facts therefore stated in the case, in my judgment the appeal must be allowed.

Conviction quashed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitors for respondent: *Wontner & Sons.*

(1) [1899] 1 Ch. 1.

J. E. A.

1908
May 6.

BLAIR *v.* CLARK.
GRAYDON, GARNISHEE.

Practice—Trial of Garnishee Issue by Master—Appeal from Decision of Master—Order XL., *rr.* 6, 6A; *Order* LIV., *r.* 21.

An appeal lies under Order XL., r. 6, to a Divisional Court from the decision of a Master upon the trial of an issue ordered by him under Order XLV., r. 4, in garnishee proceedings.

APPEAL by the plaintiff Blair against an order of a Master made on the trial of an issue ordered to be tried by the order of a Master, in which the question to be tried was whether the garnishee Graydon was indebted to the judgment debtor Clark in any and what amount at the time of a garnishee order nisi.

On October 29, 1907, the plaintiff Blair recovered judgment against the defendant Clark for 72*l.* and costs.

On November 9, 1907, by a garnishee order nisi made by Master Archibald, it was ordered that all debts owing or accruing due from the garnishee to the judgment debtor should be attached to answer the judgment, and that the garnishee should attend on an application by the plaintiff that he should pay the debts alleged to be due from him to the judgment debtor or so much thereof as might be sufficient to satisfy the judgment.

On the hearing of the last-mentioned application on November 18, 1907, it was ordered by Master Macdonell that the plaintiff and the garnishee "proceed to the trial of an issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be defendant, and that the question to be tried shall be whether the said garnishee was indebted to the judgment debtor in any and what amount at the time the said order nisi was served. And it is further ordered that the issue be prepared and delivered by the plaintiff therein within ten days from this date, and be returned by the" garnishee "within seven days and be tried by a Master of the Supreme Court, and that the question of costs and all further questions be reserved until the trial of the said issue." By the issue which was delivered by the plaintiff on

November 27, 1907, the plaintiff affirmed (inter alia), and the garnishee denied, that the sum of 15*l.* or any part thereof was on November 9, 1907, due from the garnishee to the judgment debtor.

On the trial of the issue the Master made an order, dated December 3, 1907, that the garnishee order nisi be discharged.

The plaintiff appealed.

R. W. Turner, for the garnishee. There is a preliminary objection to this appeal. It ought to have been to the judge at chambers under Order LIV., r. 21 (1), inasmuch as it is an appeal from the decision of a Master. Rules 6 and 6A of Order XL. do not apply. A trial by a Master is not a trial by a referee within the meaning of Order XL., r. 6. The parties to the trial of a garnishee issue are not parties to an action. It is true that in *Fraser* v. *Fraser* (2) it was held that when, under r. 7 of Order XIV., an action is, with the consent of the parties, ordered to be referred to a Master, an appeal lies from his decision to a Divisional Court. But there is no question of consent in the present case. The trial of the garnishee issue took place under the Master's order, a formal issue being drawn up to be tried.

[Order XLV., rr. 4 and 5; the Arbitration Act, 1889 (52 & 53 Vict.

(1) Order XL., r. 6: "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: Provided that in the Queen's Bench Division such motion shall be made to a Divisional Court."

Rule 6A: "Rules 2 and 6 of Order XL. shall apply to a reference to any officer of the Court or special referee or arbitrator under an order of the Court."

Order XLV., r. 4: "If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined."

Order LIV., r. 21: "Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal shall be by way of indorsement on the summons by the master at the request of any party, or by notice in writing to attend before the judge without a fresh summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master."

(2) [1905] 1 K. B. 368.

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c. 49) ; *Fraser* v. *Fraser* (1) ; *Webb* v. *Shaw* (2) ; *Bryant* v. *Reading* (3) ; and the Yearly Practice of the Supreme Court for 1908, vol. 1, p. 614, were also referred to.]

Lewis Thomas, K.C., and *E. H. Coumbe*, for the plaintiff. The appeal lies under Order XL., r. 6. The decision in *Fraser* v. *Fraser* (4) applies to the present case.

[Order XXXVI., r. 52, and the Annual Practice, 1908, vol. 1, p. 629, were also referred to.]

CHANNELL J. I feel considerable doubt about the preliminary objection which has been taken to this appeal. Order XLV., r. 4, deals with the special matter of a garnishee disputing his liability and the various methods in which the question is to be determined. If the issue were tried by a judge sitting in Court, or by a judge and jury, there would be no difficulty as to the tribunal to which the appeal would lie; it would be governed by the rules as to new trials or appeals from a judgment. But there is no rule which deals expressly with the matter which is now before us. It is, however, perfectly clear that the right of appeal exists, because there is no provision that the decision of the Master is to be final. It is therefore necessary to consider the various rules which provide for an appeal and to ascertain under which one the present case best comes. There are two rules only which are suggested as being applicable. One is Order XL., r. 6, which deals with a trial by a referee, and there the appeal, if it may be so called, is to be to the Divisional Court. The other is Order LIV., r. 21. That seems to indicate that what is being dealt with is an order or decision of the Master given on a summons, so that that is not very strictly applicable, although if there were no other provision I should be inclined to apply that rule. Order XL., r. 6, deals with a trial by a referee. But a Master may be a referee, first, because Order XL., r. 6A, expressly says he may, and, secondly, because *Fraser* v. *Fraser* (4) is an instance where he was so held to be; so that the word "referee" itself may cover a Master. In this case the form of the Master's order shews that he ordered a trial. There was no judgment

(1) [1904] 1 K. B. 56.
(2) (1886) 16 Q. B. D. 658.
(3) (1886) 17 Q. B. D. 128.
(4) [1905] 1 K. B. 368.

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entered, but at the same time it was a trial; and it seems to me that it is more in accordance with the general practice that an appeal from a trial should be to a Divisional Court than to a judge in chambers, especially as the rule dealing with appeals to a judge in chambers seems to refer to appeals on summons, and this is not an appeal on summons. Therefore, without saying that either rule is specially appropriate (the point appears not to have been foreseen when the rules were drafted), it seems to me that Order XL., r. 6, is more applicable than Order LIV., r. 21. We must therefore entertain this appeal.

SUTTON J. I am of opinion that the words "trial by a referee" in Order XL., r. 6, include a trial by a Master.

Preliminary objection overruled.

Solicitor for plaintiff: *John Coote.*

Solicitors for garnishee: *Amery-Parkes, Macklin & Co.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1908

June 1, 2, 4.

CRIBB *v.* KYNOCH, LIMITED (No. 2).

Employer and Workman—Compensation—Accident causing Personal Injury—Infant Workman—Notice—Unsuccessful Action against Employer—Option—Subsequent Claim for Compensation under the Act—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-ss.* 2 (*b*), 4; *s.* 2, *sub-s.* 1.

The "option" given to a workman by the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (*b*), either to claim compensation under the Act or take other proceedings cannot be confined to an option binding only in the case of success.

The procedure prescribed by s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, must be strictly followed, and that sub-section has no application except when proceedings based on the common law liability of the employer have been commenced within six months from the occurrence of the accident.

A workman cannot give the notice required by s. 2, sub-s. 1, as a foundation for future proceedings under the Act, in the event of a common law action commenced after the expiration of six months from the occurrence of the accident being unsuccessful.

The plaintiff, a girl under age, who had been injured by an accident arising out of and in the course of her employment, gave notice of the

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accident and of a claim for compensation within the prescribed time, but took no further proceedings under the Act; thirteen months after the accident, an unsuccessful action to recover damages against the employers was brought. After the dismissal of this action, an application was made to the county court judge, pursuant to the aforesaid notice, for compensation under the Workmen's Compensation Acts:—

Held, on the construction of s. 1, sub-ss. 2 (*b*) and 4, read together, that this application for compensation could not now be entertained.

Edwards v. *Godfrey*, [1899] 2 Q. B. 333, applied.

Rouse v. *Dixon*, [1904] 2 K. B. 628, discussed and explained.

Decision of the majority of the Court in *Beckley* v. *Scott & Co.*, [1902] 2 I. R. 504, disapproved.

APPEAL against the award of the judge of the county court of Grays Thurrock, Essex, upon a claim for compensation under the Workmen's Compensation Act, 1897.

The only question argued on this appeal which calls for any report was whether a workman, who has brought and failed in a common law action for negligence against his employers can subsequently apply for compensation under the Workmen's Compensation Acts. The facts, so far as material, were as follows.

Mercy Cribb, the respondent in the present appeal, a girl of about seventeen years of age, was employed by Messrs. Kynoch, Limited, manufacturers of explosives.

On February 20, 1905, the respondent met with a serious accident in the course of her employment.

On March 10, 1905, notice of the accident and of a claim for compensation under the Workmen's Compensation Act, 1897, which the Court assumed for the purposes of this appeal to be a valid notice within s. 2, sub-s. 1, of the Act of 1897, was served on Messrs. Kynoch, Limited. No proceedings were, however, commenced under the Act pursuant to this notice within the six months prescribed by s. 2, sub-s. 1.

On March 13, 1906, a common law action for negligence was brought by the respondent, suing by her next friend, against Messrs. Kynoch, Limited, to recover damages occasioned by the alleged negligence of the employers or some person for whose default the employers were responsible.

Judgment was given by the county court in the respondent's favour for 300*l*., but on appeal to the Divisional Court the

decision was reversed, and the action was dismissed: see *Cribb* v. *Kynoch, Ld.* (1), which was subsequently approved by the Court of Appeal in *Young* v. *Hoffmann Manufacturing Co.* (2)

Application was subsequently made to the county court on behalf of the respondent to obtain compensation under the Workmen's Compensation Act, 1897. The county court judge made an award in favour of the respondent. Messrs. Kynoch, Limited, appealed.

The appeal was heard on June 1 and 2.

C. E. Jones, for the appellants. It is clear from the language of s. 1, sub-s. 2 (*b*), of the Act of 1897 that the workman has the option given him of taking proceedings under the Act for the assessment of compensation or of bringing an action against his employer independently of the Act, but he cannot do both. The object of the sub-section is to prevent double proceedings against the employer. Where the workman exercises his option by bringing an action independently of the Act, and fails in the action, he can only obtain the benefit of the Act by availing himself of the provisions of s. 1, sub-s. 4; but then the action must have been brought "within the time hereinafter in this Act limited"—that is, by s. 2, sub-s. 1, within six months from the occurrence of the accident. The point appears to be covered by *Edwards* v. *Godfrey*. (3) Even assuming that the notice of March 10, 1905, was a good notice, it is now too late to apply for compensation under the Workmen's Compensation Act, 1897, or under the Workmen's Compensation Act, 1906, where the wording of s. 1, sub-s. 2 (*b*), and sub-s. 4 is the same as the sub-sections under consideration in the Act of 1897.

[COZENS-HARDY M.R. referred to *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (4)]

G. F. Emery and *Edward Hart*, for the respondent. The workman in this case was an infant, and by reason of infancy was not bound, so far as the exercise of any option is concerned, by having brought the action for negligence: *Stephens* v.

(1) [1907] 2 K. B. 548.
(2) [1907] 2 K. B. 646.
(3) [1899] 2 Q. B. 333.
(4) [1906] 2 K. B. 558.

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Dudbridge Ironworks Co., Ld. (1) The option mentioned in s. 1, sub-s. 2 (*b*), must be a real exercise of the option, and must be exercised for the benefit, in this case, of the infant, who cannot now be precluded from exercising the option to proceed under the Workmen's Compensation Act, 1897, by reason of the common law action.

Notice having been given on March 10, 1905, it is not too late now to go to arbitration under the 1897 Act: *Powell* v. *Main Colliery Co.* (2)

Sect. 1, sub-s. 2 (*b*), recognizes the liability of the employer under the common law as still existing, and preserves that liability, and only prevents subsequent proceedings where a claim under the Workmen's Compensation Act has been carried through. The employer is not to pay twice over, but when the workman has failed in the common law action it was not intended to preclude him from getting the benefit of the Act. *Rouse* v. *Dixon* (3), following the opinion of the majority of the judges in *Beckley* v. *Scott & Co.* (4), is in favour of this contention. The cases of *Edwards* v. *Godfrey* (5) and *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (6) are distinguishable, and the judgment of A. L. Smith L.J. in *Edwards* v. *Godfrey* (5) is not addressed to a case like the present, where a valid notice under s. 2, sub-s. 1, has been given, under which the right to compensation is suspended only, not extinguished by what has taken place since.

C. E. Jones in reply. The respondent did exercise an option to proceed by a common law action. The method of exercising this option is discussed in *Rouse* v. *Dixon*. (3) The exercise of the option was a step in the action which was allowed to proceed to judgment. In such a case an infant is just as much bound by the proceedings as an adult would be: *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (6)

Cur. adv. vult.

June 4. COZENS-HARDY M.R. The plaintiff met with an accident and gave within six months a notice, which I assume

(1) [1904] 2 K. B. 225.
(2) [1900] A. C. 366.
(3) [1904] 2 K. B. 628.
(4) [1902] 2 I. R. 504.
(5) [1899] 2 Q. B. 333.
(6) [1906] 2 K. B. 558.

would have been a good notice, of a claim for compensation under the Workmen's Compensation Act. But the plaintiff did not follow up that notice. After waiting more than six months she commenced a common law action against her employers. It was held on appeal from the county court that the defendants were not liable, and the judgment of the county court judge in her favour for 300*l.* damages was set aside: *Cribb* v. *Kynoch, Ld.* (1) She now seeks to proceed against the defendants under the Workmen's Compensation Act. The county court judge has held that she can do so and has made an award in her favour. In my opinion this award cannot be supported. The policy of the Act is that an employer ought not to be exposed to liabilities under the Act and outside the Act in respect of the same accident. This is manifest from s. 1, sub-s. 2 (*b*). The workman has an option. The language of that sub-section is not very happy, for it admits of the construction that it has no application unless in fact the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. And it has been established here that there was no such negligence or wilful act. Nevertheless I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action and, having failed in that action, then proceed under the Act. The single exception is contained in sub-s. 4 of s. 1, and it strongly confirms that view and seems to me to negative any wider or inconsistent right. By sub-s. 4, "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by

(1) [1907] 2 K. B. 548.

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the plaintiff bringing the action instead of proceeding under this Act." As regards that sub-section two points are clear. In the first place it has no application except when proceedings based on the common law liability of the employer have been commenced within six months from the occurrence of the accident; and, secondly, the right given to the workman in that case is hedged in and guarded by the provision in favour of the employer that the costs of the action may be deducted from the compensation. It seems to me that that provision is a striking instance of the principle that when you find one particular case provided for it is not right to assume that a perfectly general right is given in all other cases outside that particular instance. Apart from the authorities, with which I will deal presently, in my opinion the true view of the Act is, that when a workman who has failed in proceedings against his employer, based on the employer's common law liability, has brought his action within six months, in that case, and in that case only, is a remedy given to the workman under the Workmen's Compensation Act. But I think that this case is, I will not say concluded by authority, but greatly assisted by authority. In *Edwards* v. *Godfrey* (1) the Court of Appeal held that the procedure prescribed by sub-s. 4 must be strictly followed. To fall within that sub-section the action must have been commenced within the six months, and before I read a passage from the judgment of A. L. Smith L.J. in that case I would call attention to the result that would follow if the opposite view to that which I have taken of the meaning of the Act were adopted. If the workman can give notice within six months from the date of the accident, as a foundation for future proceedings, and then remain quiescent over any period allowed by the Statute of Limitations, he could then commence his common law action, which might fail, and then he could apply under the Workmen's Compensation Act without the risk of having the costs of his common law action deducted from the compensation that he might recover. A. L. Smith L.J. in *Edwards* v. *Godfrey* (1) says (2): "As I read s. 1, sub-s. 2 (*b*), it gives to the workman, in cases where he would previously have had a right of action, an

(1) [1899] 2 Q. B. 333. (2) [1899] 2 Q. B. 333, at p. 337.

option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself; this seems to me to be the clear meaning of the sub-section. The respondent has availed himself of the right given by that sub-section; he has exercised his option in favour of bringing a common law action which has failed." The learned Lord Justice, therefore, assumed that the option had been exercised, although it had failed. "Having been defeated in this action, there would, but for the provisions of s. 1, sub-s. 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option, and finds too late that he has exercised it in the wrong way; it gives him a locus pœnitentiæ, and enables the county court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act. That is a clear benefit to the workman, and while giving it to him the sub-section also confers a benefit upon the employer by giving the county court judge power to deduct from the compensation which he awards all the costs caused by bringing the action instead of taking proceedings under the Act; that is a fair enactment, giving something to master and man alike. I believe the construction which I have placed upon sub-s. 4 to be the true one; were it not so, the workman would never make his application for an assessment of compensation while the county court judge had seisin of the action; he would wait until the action was at an end, and would then bring a fresh claim under the Workmen's Compensation Act, and would so get compensation without having the costs caused by his bringing the action set off against the amount of his compensation." The matter came before the Irish Courts in *Beckley* v. *Scott & Co.* (1), a case in which there was a remarkable difference of view both in the Court below and in the Court of Appeal. The facts of that case are not identical with those of the present case, but they are so similar that I think I should refer to them. The plaintiff in that case had previously taken proceedings under the Workmen's Compensation Act, 1897,

(1) [1902] 2 I. R. 504.

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before the Recorder of Dublin, and the Recorder had decided that the plaintiff was not within the Workmen's Compensation Act and had dismissed the application. The plaintiff did not appeal from the Recorder's decision, but he subsequently brought an action in the superior Courts for damages for negligence on the part of his employers. It was held by the King's Bench Division, Boyd J. dissenting, that the proceedings in the Recorder's Court were no bar to the action in the superior Court. In the Court of Appeal FitzGibbon L.J. and Walker L.J. took the same view, Holmes L.J. dissenting. I have read those judgments, and, with the greatest respect to the learned Lords Justices, I must say that the judgment of Holmes L.J. commends itself to my mind rather than the judgments of the majority of the Court. I will read one passage from his judgment on p. 533: "If the employer is not to be liable to pay compensation both under and independently of the Act, is he to be subjected to the expense, trouble, and inconvenience of two sets of proceedings? In many cases the question at issue in a claim under the Act and in a common law action for damages is the same. If I am to judge by what I read and hear, claims for compensation are often resisted on the ground that the injury is attributable to the serious and wilful misconduct of the workman, and two or three of the most recent cases before this Court have turned on this point. But this is a good defence to an action for damages; and it would seem highly unreasonable that a matter that had been fought out and adjudicated upon in one tribunal could be forthwith reopened in another. I think that it must have been the desire to guard against an employer being subjected to two lawsuits to recover compensation for the same injury that led to the introduction, immediately after the provision that secures to the workman his old right of action, of the remarkable words 'but in that case the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act.'" A similar case came before the King's Bench Division in this country in *Rouse* v. *Dixon*. (1) In that case the workman claimed compensation from his employer under the

(1) [1904] 2 K. B. 628.

Workmen's Compensation Act and filed a request for arbitration. The employer set up the defence that the building in which the accident happened did not exceed thirty feet in height, which was the fact. The workman thereupon gave notice withdrawing his claim for compensation, and subsequently brought an action for damages under the Employers' Liability Act, 1880, in respect of the same accident. It was held that the claim made under the Workmen's Compensation Act was not a bar to the subsequent action for damages under the Employers' Liability Act. No doubt there are passages in the judgments of the Court in that case which are difficult to reconcile with the decision of the Court of Appeal in *Edwards* v. *Godfrey* (1), and it is right to say that the Lord Chief Justice and Wills J. both expressed their concurrence with the majority of the Court of Appeal in Ireland in *Beckley* v. *Scott & Co.* (2), but Kennedy L.J., then Kennedy J., expressed the opinion that it was not impossible to construe s. 1, sub-s. 2 (*b*), as meaning that the option may be exercised unless and until a claim has proceeded to a decision. Here we have a claim that has proceeded to a decision; we have the precise case contemplated by sub-s. 4, and in my opinion we must hold that, when the order of events is that which we have here, the only case in which a workman can obtain compensation against his employer under the Act is when he has brought his action within six months, and, with the greatest respect to the learned county court judge, I think that this is not a case in which a workman can obtain compensation under the Act, and the appeal must be allowed.

BUCKLEY L.J. The accident was on February 20, 1905. For the purpose of this judgment I assume, without deciding it, that on March 10, 1905, notice was duly given under the Workmen's Compensation Act, 1897. At the date when that Act was passed there existed a liability at common law in the employer under certain circumstances. That liability was (except as presently mentioned) left unaffected by the Act. The Act further created a new statutory liability. Sect. 1, sub-s. 2 (*b*), provides that in

(1) [1899] 2 Q. B. 333. (2) [1902] 2 I. R. 504.

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cases where there is a common law liability the workman may, at his option, either claim compensation under the Act in respect of the new statutory liability or take the same proceedings as were open to him before the commencement of the Act (that is, enforce the common law liability), but that the employer shall not be liable to pay compensation both independently of and also under the Act. Proceedings under the Act must be initiated within six months (s. 2, sub-s. 1). Proceedings to enforce the common law liability may be commenced at any time within the period of the Statute of Limitations; but if such an action be commenced within the six months, s. 1, sub-s. 4, provides that, if the action fails, the Court, if the plaintiff so chooses, shall proceed to assess compensation in respect of the statutory liability; but in such case the costs caused by the plaintiff bringing an action, instead of proceeding under the Act, may be deducted from the compensation. The workman in this case did not bring an action within the six months, but commenced one on March 13, 1906. In so doing she was affirming that the employer was under common law liability. From that moment she could not, I think, be heard to say that s. 1, sub-s. 2 (*b*), did not apply. Had she, on March 14, 1906, or subsequently, sought to go on with her proceedings under the Act, the provisions of s. 1, sub-s. 2 (*b*), would have been available to the employer as an answer to her prosecuting both sets of proceedings. She was proceeding with her action because her case was that s. 1, sub-s. 2 (*b*), did apply, and she could not have been heard to say the contrary. It was impossible for her while prosecuting her action to affirm at the same time that she was in a position to go on with her proceedings under the Act. It remains, however, to consider whether the right to continue the proceedings under the Act was thereby finally precluded or was only suspended. In my opinion it was finally precluded. Upon this point s. 1, sub-s. 4, is material. That sub-section provides that if the workman within the six months brings his action to enforce the common law liability and fails, he may in the action have an assessment of the compensation payable in respect of the statutory liability, subject to deduction, if the Court thinks fit, of the costs of the action. This section is therefore one which benefits

the workman in that it preserves to him after the expiration of the six months an assessment in this particular way of the compensation payable in respect of the statutory liability, and benefits the employer in that it allows deduction from such compensation of the costs of the defeated action. In my opinion this is to be the only means by which the plaintiff in a defeated action is to be entitled after the expiration of the six months to recover the statutory compensation. This, in fact, is involved in the reasoning of the decision of this Court in *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (1) If this were not so, it would be competent to the workman by giving notice within the six months, and subsequently, at any time within the period of the Statute of Limitations, commencing his action, to extend the period for assessing compensation under the statutory liability in the event of his action proving unsuccessful, and that without the protection afforded by s. 1, sub-s. 4, to the employer of having the costs of the defeated action deducted from the compensation. This is exactly that which I think the Act intended to prevent. The point for decision here is really covered by what was said in *Edwards* v. *Godfrey* (2) and *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (1) The point was taken that the workman in this case was an infant, and *Stephens* v. *Dudbridge Ironworks Co., Ld.* (3) was cited as an authority for the proposition that the applicant by reason of infancy was not bound by having brought and prosecuted the action. There is nothing in the point. In *Stephens* v. *Dudbridge Ironworks Co., Ld.* (3) the applicant, being an infant, had contracted or purported to contract by a contract which was not for his benefit, and the Court did but apply the ordinary rules in such a case. In the present case the litigation, duly commenced in the name of the infant by a next friend, was prosecuted to judgment. In such case an infant is just as much bound by the proceedings as if he were adult. If authority be needed, *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (1) is authority for the proposition. In my opinion the appellants are entitled to succeed, and the claim ought to be dismissed with costs.

(1) [1906] 2 K. B. 558. (2) [1899] 2 Q. B. 333.
(3) [1904] 2 K. B. 225.

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KENNEDY L.J. This case is one which to my mind is by no means free from difficulty, and I shall, therefore, shortly state the reasons which make me concur in the judgments which have been delivered by the Master of the Rolls and Buckley L.J. We have to construe an Act which on this point is not exactly covered by any previous case. An action was brought on behalf of the respondent, an infant, seeking to make the employers liable independently of the Workmen's Compensation Act, 1897, in respect of an injury caused by an accident in the course of her employment. Those proceedings were successful in the county court, but there was an appeal to the Divisional Court which resulted in the success of the defendants, the appellants here. The question then arises whether or not the respondent can afterwards succeed by taking proceedings under the Workmen's Compensation Act, 1897, in regard to which I assume that a valid initiatory claim had been made within the period required by the Act. The respondent had no right to ask the Court to assess compensation in the common law action as provided by s. 1, sub-s. 4, of that Act, because the action was not brought within the period, six months, limited for taking proceedings under s. 2, sub-s. 1, of the Act of 1897, and the contention is that she can now go back and claim compensation under that Act. I am of opinion that that contention is not well founded. The case depends on s. 1, sub-ss. 1 (*b*) and (4), of the Workmen's Compensation Act, 1897, which is re-enacted in the Workmen's Compensation Act, 1906. I agree that if sub-s. 1 (*b*) were read entirely without reference to sub-s. 4, the case made on behalf of the applicant would be a stronger one, because no doubt sub-s. 1 (*b*) is framed in a way which, if read according to its natural meaning, causes difficulty owing to the words "when the injury was caused by the personal negligence or wilful act of the employer," which would seem to postulate a case in which there was a valid claim under the Employers' Liability Acts or at common law, and which, coupled with the provision that the employer is not to "pay compensation," both independently of and also under the Act, would seem to suggest that it is only where the workman succeeds—whether independently of or under the Act—

that the Legislature intended to impose any bar to the alternative proceedings; but I do not think that that is the true meaning of the section. I have looked again at the case of *Rouse* v. *Dixon* (1), and I am still of opinion that the word "option" in the section cannot be confined, even in view of the later words, to an option binding only in the case of success. In other words, it seems to me that when a decision is given either way the workman must be considered as having made his option, and that such option is final and conclusive subject to the provisions of s. 1, sub-s. 4, alone. With regard to the word "option" I may refer to a passage in the judgment of Holmes L.J. in *Beckley* v. *Scott & Co.* (2), where he says (3): "As I understand the English language, when an option is given to a person to take either of two courses, he is not to take both; and as I understand legal principle, an option or election of this kind once exercised must be adhered to." At the foot of the same page Holmes L.J. deals with the argument that if a claim for compensation makes it impossible to take other proceedings there was no necessity for the enactment that the employer is not to be liable to pay double compensation, and he observes, "Possibly the second of these provisions is included in the first; but surplusage has long since become as common in Acts of Parliament as in other kinds of literature." That, in my opinion, is the sounder construction of the Act, and leads me to think that the words "when the injury was caused" mean "when the injury was alleged to be caused," and that the workman's success is not the only ground on which he can be excluded from taking alternative proceedings. I now turn to sub-s. 4, and that contains a proviso which appears to be a fair and just supplement of s. 1, sub-s. 2 (*b*), which I have just read; that is to say, if the action outside the Act is brought within the time limited for taking proceedings under the Act, and if the action is unsuccessful, the plaintiff has the choice of asking the Court to treat it as an application under the Act, thus giving him a locus pœnitentiæ, but only on the terms that the Court may make a deduction from the compensation of all

(1) [1904] 2 K. B. 628. (2) [1902] 2 I. R. 504.
(3) Ibid. at p. 534.

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or part of the costs of the unsuccessful action. The short question before us can, it seems to me, be put thus: Is that the only case in which the employer can be sued twice over? On the whole I think that it is, and I think that A. L. Smith L.J., in delivering the judgment of the Court in *Edwards* v. *Godfrey* (1), really says so, unless the judgment may be read as not applying to a case in which the person injured has already and within due time instituted proceedings under the Act. That is the case put forward on behalf of the respondent before us. She says, "I had a valid claim for compensation under the 1897 Act, which, during the pendency of the common law action, was dormant only," and it is contended that the language of A. L. Smith L.J. in *Edwards* v. *Godfrey* (1), which has been read by the Master of the Rolls, does not deal with the case of a person who has not merely begun his action, but has also initiated in due form proceedings for compensation under the Workmen's Compensation Act which he might have gone on with. It is urged that such a case as that is not referred to by A. L. Smith L.J., and in terms it is not. It was not necessary to refer to it having regard to the facts. The present case, therefore, is not absolutely covered by the decision, but I think that the principle is there laid down with sufficient generality to make it, in the statement of the law by A. L. Smith L.J., impossible to regard it otherwise than as an authority in the appellants' favour. In *Cattermole* v. *Atlantic Transport Co., Ld.* (2) the question to be decided is stated in the headnote thus: "Where on the failure of an action brought under the Employers' Liability Act, 1880, to recover damages for injury caused by an accident compensation is assessed under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, the Court before which the action is tried has power to deal with the costs, including costs of the proceedings for the assessment of compensation." Stirling L.J., who read the judgment of the Court, said this: "The effect of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, is to compel the workman to elect whether he will claim compensation under the Act, or take such proceedings as were open to him before the Act. If he adopts the latter course

(1) [1899] 2 Q. B. 333. (2) [1902] 1 K. B. 204.

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he cannot make any claim under the Act, except by virtue of s. 1, sub-s. 4, of the Act: see *Edwards* v. *Godfrey*. (1) That sub-section provides that if an action is brought to recover damages independently of the Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of the Act, the action shall be dismissed, 'but the Court in which such action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under the Act.'" There again, if the words of the Lord Justice are read without qualification, they would cover this case just as much as the words of the judgment in *Edwards* v. *Godfrey* (1); but it is true that the Lord Justice does not refer to the fact that the sub-section applies only to a case in which the action is brought within the time limited for taking proceedings under the Act, that is, within six months from the occurrence of the accident. But if Stirling L.J. had thought that the presence or absence of the limitation would affect the correctness of his statement of the law, I do not think that he would have made, as he does, the statement without qualification. One other case in the Court of Appeal to which I wish to refer is that of *Taylor* v. *Hamstead Colliery Co., Ld.* (2) In that case, in reversing the decision of the Divisional Court, Collins M.R. stated the law arising on these two sections in this way: "The section of the Workmen's Compensation Act, 1897, on which the decision of the Divisional Court turned is s. 1, sub-s. 2 (*b*). That section expresses that the remedy of a workman under that Act and his remedy apart from that Act, where the injury to him is caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, are not concurrent, but separate, and the workman is given an option to proceed in either mode. That the exercise of the option is conclusive was decided by this Court in *Edwards* v. *Godfrey*. (1) It is pointed out by A. L. Smith L.J., who delivered

(1) [1899] 2 Q. B. 333. (2) [1904] 1 K. B. 838.

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the leading judgment, that the workman who had brought a common law action had failed in it; and that but for the provisions of s. 1, sub-s. 4, of the Act there would have been an end of any claim by him against his employer. That section, as the Lord Justice pointed out, gives him a locus pœnitentiæ by enabling him to apply to the county court judge before whom the action is tried to assess compensation under the Workmen's Compensation Act. That application must, however, be made at the time, and the workman cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the Workmen's Compensation Act. That is a clear decision of this Court that the two proceedings are not concurrent." It seems to me that we ought to treat these judgments as stating a principle which applies to the decision of this case. I feel now, as I did when dealing with the case of *Rouse* v. *Dixon* (1), that according to the true construction of the two sections they mean that the option is one which is exercised when a decision of the Court, whether in favour of or adverse to the workman, is arrived at, and that the only case in which, after failure of the action, the Workmen's Compensation Act can be invoked is that provided for by s. 1, sub-s. 4. The justice of that appears to me to be emphasized when you look at s. 14 of the First Schedule to the Workmen's Compensation Act, 1897 (which is substantially re-enacted by s. 19 of the First Schedule to the Act of 1906), which provides that weekly payments shall not be capable of being "assigned, charged, or attached." Sect. 1, sub-s. 4, giving a locus pœnitentiæ to the plaintiff in one case, also gives the Court the right in that one case to make the deduction. In the present case the action was not brought till thirteen months had elapsed from the date of the accident. Therefore the provisions of sub-s. 4 do not apply, and in my opinion there is no ground for assuming any exception in favour of the applicant on the ground of infancy. In my opinion the appeal should be allowed.

Appeal allowed.

Solicitors: *Morris & Bristow, for W. Morris, Birmingham; F. E. Green.*

(1) [1904] 2 K. B. 628.

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.

1908

June 3.

ANDREWS *v.* ANDREWS AND MEARS.

Employer and Workman—Compensation—Workman employed by Sub-contractor —Liability of Principal—Accident "on or in or about Premises"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1, 4.

A workman who was employed in connection with certain paving operations by a sub-contractor, his duties being to cart materials for the work and remove rubbish, while so engaged was accidentally killed n the public street at a distance of two miles from the site of the work :—

Held, that the accident had not occurred "on, or in, or about premises" on which the principal contractor had undertaken to execute the work, or which were "otherwise under his control or management" within s. 4, sub-s. 4, of the Workmen's Compensation Act, 1906, and that consequently the principal was not liable to pay compensation under the Act.

APPEAL from an award of the judge of the Marylebone County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906, in favour of the dependants of a deceased workman. The appellant Mears was a builder and contractor. In August, 1907, he had contracted to do certain paving work near the Albert Hall, Knightsbridge. Part of his contract was to cart sand to Knightsbridge and remove rubbish from the same place. Mears had sub-let a part of this contract to a carter named Andrews. On August 16, 1907, the deceased, who was a son of Andrews and in his employment, was engaged in carting a load of rubbish from the Albert Hall. While on this journey he fell from his cart in the public street at a place about two miles distant from the Albert Hall and was killed.

Upon these facts the learned county court judge held that Andrews, as employer, was liable to pay compensation to the dependants of his son. He also held that Mears was liable as "the principal" within the Workmen's Compensation Act, 1906, s. 4, sub-s. 1, on the ground that under the contract the work of carting was to be executed not only at the termini from and to which the rubbish was to be carted, but also on the roads between those termini along which the carting was to be done, and that consequently the accident occurred "on, or in, or about

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premises" on which Mears had undertaken to execute the work in the course of which the accident occurred. (1)

From this decision Mears appealed.

J. A. Simon, K.C., and *Shakespeare*, for the appellant. Under the Workmen's Compensation Act, 1897, the liability of the employer to compensate the workman was limited to the case of accidents happening "on or in or about" the works of the undertaker. That limitation was removed by the Act of 1906, s. 1, so far as regarded claims against the workman's immediate employer. But the words are reintroduced, in the case of a sub-contract, by s. 4 of the new Act, sub-s. 4 of which provides that the section shall not apply in any case where the accident occurred "elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

[COZENS-HARDY M.R. The words must be construed as they were under the old Act.]

The learned county court judge has wrongly construed them.

J. Duncan and *W. Andrews*, for the respondents. The words used in sub-s. 4 will include the roads between the two termini, namely, the site of the work at the Albert Hall and the place where the rubbish was to be shot. If in this case the deceased had

(1) The Workmen's Compensation Act, 1906, s. 4, provides: "(1.) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed . . . .

"(4.) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

been making an unauthorized deviation on his own account the appellant would not have been liable, but carting along the roads between the two termini was an essential part of the work to be executed; the distance between the termini is immaterial. "Premises on which the principal has undertaken to execute the work" includes the whole area of the land upon which the work or any part of it is to be done: *Rogers* v. *Cardiff Corporation* (1); *Middlemiss* v. *Berwickshire County Council.* (2) [*Back* v. *Dick Kerr & Co., Ld.* (3), *Fenn* v. *Miller* (4), and Ruegg's Employers' Liability and Workmen's Compensation, 7th ed. p. 332, were also referred to.]

COZENS-HARDY M.R. I think, with the greatest respect for the learned county court judge, that he has arrived at a wrong conclusion. This is a case which could not have arisen under the old Act, but under the new Act a liability is first imposed in all cases in favour of a workman against his employer, and then in certain cases there is an additional liability against a person who is called "the principal," although the workman is not employed by such principal, but by a sub-contractor. But it is quite obvious that it would not do to hold the principal liable for every accident which might occur to a workman who is not employed by him, but by a sub-contractor; so at the end of s. 4, which imposes that additional liability, there is this proviso (sub-s. 4): "This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

What are the undisputed facts in the present case? [His Lordship stated the facts, and continued:—] We are asked to hold that this accident occurred "on or in or about premises" on which Mears had undertaken to execute the work or which were "otherwise under his control or management." I am entirely unable to see how that contention can be supported. The learned county court judge, in a very carefully considered

(1) [1905] 2 K. B. 832.
(2) (1900) 2 F. 392.
(3) [1906] A. C. 325.
(4) [1900] 1 Q. B. 788, at p. 791.

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judgment, has stated, without a particle of evidence to support him, that it was part of the contract that the rubbish should be shot at a particular place. That is quite contrary to the evidence, which was that it might be shot anywhere. But to say that any portion of the roads radiating from the Albert Hall and extending to any distance over which the sub-contractor might be minded to take his cart can be considered as premises on or in or about which Mears had undertaken to execute the work or which were otherwise under his control or management seems to me to be giving a wholly unnatural and unjustifiable meaning to the language of the proviso to the section. In my opinion the dependants of the deceased workman in the present case have a remedy of course against his employer, his father, but not against Mears. The appeal must therefore be allowed.

BUCKLEY L.J. I am of the same opinion, and will add a few words as to my view of the construction of s. 4. [The Lord Justice read the section, and continued:—] The question here is this: The principal had undertaken to do certain carting work from the Albert Hall; was the public street between the Albert Hall and St. Quintin's Avenue, at a distance of some two miles from the Albert Hall, "premises on or in or about which the principal had undertaken to execute the work or which were otherwise under his control or management"? In my opinion a street, the public highway, was not for this purpose "premises" on which the work was to be executed. That word implies some definite place with metes and bounds, say land, or land with buildings upon it. Nor was it a place "otherwise under the control or management" of the principal. A public street is not, in my opinion, within these words at all. One might put numerous instances of work which is to be done, coupled with the obligation of bringing and delivering the finished article or of taking away the work to be done and bringing it back again. It seems to me that it would be impossible to say that the operation of so conveying the work over the public road is done on premises on or in or about which the principal has undertaken to execute the work or which are otherwise under his control or management.

The result is that s. 4 does not, in my opinion, apply, and the principal here is not liable.

KENNEDY L.J. I entirely agree with the judgments already pronounced, but I do not quite accept my brother Buckley's view about "premises" being necessarily confined to land. There are cases which indicate that "premises" may have a wider meaning. But here, assuming for a moment that the place from which the rubbish was to be conveyed could constitute "premises" within the meaning of the sub-section, the accident did not happen there. The man had got a long distance on the road. The premises to which he might take the rubbish were entirely in his choice at that time, and in no sense could they be said to be under the control or management of the appellant Mears, nor was the place to which the workman was going "premises" on or in or about which the principal had undertaken to execute any work. I cannot understand the judgment of the Court below.

BUCKLEY L.J. I quite accept the correction of Kennedy L.J. I did not intend in using the word "land" to exclude a ship or anything of that kind.

Appeal allowed.

Solicitors: *Wm. Heard & Son; S. A. Clench & Co.*

G. A. S.

C. A.

1908

May 21, 22.

[IN THE COURT OF APPEAL.]

PLUMPTON AND ANOTHER *v.* BURKINSHAW.

Principal and Agent—Lunatic not so found by Inquisition—Person appointed under Lunacy Act to carry on Business of Lunatic—Personal Liability on Contracts made in carrying on Business—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 124.

By an order made by a Master in Lunacy under s. 116 and s. 120 of the Lunacy Act, 1890, the defendant was authorized to exercise the powers of a committee of the estate of a lunatic not so found by inquisition as in the case of a person of unsound mind so found by inquisition, and to carry on his business, which had been carried on by the lunatic in the name of a firm of which he was the sole partner. While carrying on the business under the order, the defendant ordered goods in the name of the firm, and the goods were supplied by the plaintiffs for the purposes of the business. The plaintiffs having sued the defendant personally for the price of the goods supplied by them:—

Held, that the effect of the order made under the Lunacy Act, 1890, was to make the defendant the agent of the lunatic for the purpose of carrying on his business, and that, in the absence of evidence that the defendant intended to pledge his personal credit, the mere fact that he carried on the business under the order did not make him personally liable to the plaintiffs for the goods supplied by them.

Burt, Boulton & Hayward v. *Bull*, [1895] 1 Q. B. 276, and *Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265, considered.

APPEAL of the plaintiffs from the judgment of Sutton J. at the trial of the action at Leeds without a jury.

The action was brought to recover the balance of an account for the price of goods sold and delivered by the plaintiffs to the defendant, with interest. The plaintiffs, who were oil and seed merchants, had for some time prior to the year 1901 sold goods to a firm of J. Ellershaw & Sons, in which the sole partner was one Arthur Ellershaw. In 1901 Arthur Ellershaw became mentally infirm and incapable of managing his affairs; he was not found a lunatic by inquisition, but on April 1, 1901, an order was made by a Master in Lunacy under s. 116 of the Lunacy Act, 1890 (1), which provided (inter alia) as follows: "It having

(1) By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, sub-s. 1: "The powers and provisions of this part of this Act relating to management and administration apply . . . . (c) to every person lawfully detained as a

been established to my satisfaction that the said Arthur Ellershaw, though not lawfully detained as a lunatic not so found by inquisition, is through mental incapacity arising from disease incapable of managing his affairs, I do order that upon the certificate of the said Masters that he has completed his security the said William Parker Burkinshaw be and hereby is authorized to exercise as regards the estate of the said Arthur Ellershaw the powers of a committee of the estate, as in the case of a person of unsound mind so found by inquisition, and to carry on the business of the said Arthur Ellershaw, and for that purpose to employ the assets of the said Arthur Ellershaw, and that he be at liberty to pay the premiums payable to such guarantee society as the said Masters shall accept as his security out of the estate of the said Arthur Ellershaw." On April 3, 1901, notice of the order was given to the plaintiffs and other customers in the following letter from the solicitors of Ellershaw, who also acted as solicitors for the defendant in the present action: "We beg to inform you that on Monday, the 1st instant, Mr. William Parker Burkinshaw, of this city, was, subject to the completion

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lunatic though not so found by inquisition; (*d*) to every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs."

By sub-s. 2: "In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exerciseable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge."

By s. 120: "The judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things . . . . (*c*) carry on any trade or business of the lunatic."

By s. 124: "The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject."

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of his security, authorized by the Court to carry on the business of Mr. Arthur Ellershaw, and for that purpose to employ his assets, and to exercise as regards the estate of that gentleman all the powers of a committee of the estate." The defendant, who was so appointed, was a chartered accountant, and he continued to carry on the business of J. Ellershaw & Sons under the above order. Down to October, 1907, goods were supplied by the plaintiffs to the firm of J. Ellershaw & Sons upon orders given by the defendant in the name of the firm, and the present action was brought to recover the balance of the plaintiffs' account for the goods so supplied by them. At the trial Sutton J., acting upon the decision of Grantham J. in *Isaacs* v. *Chinery* (1), gave judgment for the defendant. The plaintiffs appealed.

Mark Romer, *K.C.* (*Longstaffe* with him), for the plaintiffs. The defendant was, under the circumstances, personally liable for the price of the goods supplied on his orders. He carried on the business in the name of the firm and was in the same position as a person who is appointed by the Court receiver and manager of the business of a limited company, and where such a person orders goods for the company's purposes the prima facie inference is that he pledges his personal credit for the goods looking for indemnity to the assets of the business: *Burt, Boulton & Hayward* v. *Bull.* (2) The language of Lord Esher M.R. in his judgment is wide enough to cover the facts of the present case. It is true that in *Owen & Co.* v. *Cronk* (3) a receiver appointed by the trustees under a trust deed to secure the debentures of a limited company, who carried on the business in the name of the company, was held to be a mere agent and not to incur any personal liability for the price of goods ordered by him, but that case turned upon the language of the trust deed, which provided that the receiver was to be deemed to be the agent of the company, and, being known to be the agent of a known principal, he did not incur any personal liability; the case is therefore not in point. The real question for determination in all similar cases is the proper inference of fact to be drawn from

(1) (1896) 74 L. T. 320. (2) [1895] 1 Q. B. 276.
(3) [1895] 1 Q. B. 265.

the relation of the parties, and the proper inference in the present case is that the plaintiffs intended to give credit, not to the lunatic, who was incapable of managing his own affairs, but to the defendant, who gave the orders and carried on the business as though he were the principal. If this were not so, and if the only remedy of the plaintiffs were against Arthur Ellershaw, they would be obliged to bring an action against the lunatic himself and then apply to the Court to enforce the judgment; it is very doubtful, even if the debt were not disputed, whether the plaintiffs could take advantage of r. 33 of the Lunacy Rules of 1892 and enforce their claim without action.

Scott Fox, K.C., and *Adair Roche*, for the defendant, were not called upon to argue.

SIR GORELL BARNES, PRESIDENT. I am of opinion that the judgment of Sutton J. was correct and should be affirmed. The question arises under these circumstances. Arthur Ellershaw was the sole partner in the firm of J. Ellershaw & Sons; the plaintiffs are oil and seed merchants, and had dealings with that firm. In 1901 Arthur Ellershaw suffered from an infirmity, which resulted in the order of April 1, 1901, made under the Lunacy Act, 1890, by which Arthur Ellershaw was declared to be through mental infirmity arising from disease incapable of managing his affairs, and the defendant was authorized to exercise the powers of a committee of his estate, as in the case of a person of unsound mind so found by inquisition, and to carry on his business. The defendant proceeded to carry on the business, in the course of which debts were incurred to the plaintiffs for goods sold and delivered; it is in respect of these debts that the present action is brought to recover a balance of account. The defence is that the defendant is not personally liable, that he was only acting under the powers conferred upon him by the order made under the Act of 1890, and that the plaintiffs must look to Ellershaw's estate for payment.

I need only refer shortly to two or three sections of the Lunacy Act, 1890. [His Lordship read the sections already set out, and proceeded:—] It is clear from the language of these sections that similar powers to those given to the committee of a lunatic

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so found by inquisition are given in cases similar to that of Arthur Ellershaw.

The plaintiffs contended that the defendant was personally liable to them for the amount of their claim for goods supplied to the firm of J. Ellershaw & Sons because he carried on the business of that firm in the firm name. The answer was that under the provisions of the Lunacy Act, 1890, to which I have already referred, the defendant was not carrying on the business so as to make himself personally liable, but was carrying it on on behalf of a lunatic not so found by inquisition, and that he was an agent of the lunatic and was acting under the control of the Court. There is no suggestion that anything was done by the defendant which would shew that he undertook any express personal obligation; on the contrary, the circular of April 3, 1901, which was sent out by Ellershaw's solicitors on his behalf, was a clear intimation to the plaintiffs and the other customers to whom it was sent that the defendant was only carrying on the business under the powers conferred by the order and by the Act itself, and that he did not pledge his personal credit or undertake any personal liability. The only question for us is whether by carrying on Arthur Ellershaw's business under the order the defendant has incurred a personal liability for goods supplied to the business while he was carrying it on. After reading the provisions of the Lunacy Act, 1890, it is plain to me that he has not; the defendant was acting throughout for and in the name of a person who was a lunatic not so found by inquisition. That appears to me to put an end to the whole dispute in the action. The only authority which has been relied on by the plaintiffs is *Burt, Boulton & Hayward* v. *Bull* (1), but that is an entirely different case from the present. There the action was brought against the receiver and manager of a limited company appointed by the Court, with various powers conferred on him by his appointment, and it was contended that the language used by Lord Esher M.R. in giving judgment was wide enough to cover the present case. But that language was used with reference to the case then before the Court, in which it could not be said that the defendant was acting as the

(1) [1895] 1 Q. B. 276.

agent of the company; he was acting without principals and on his own behalf, and therefore rendered himself personally liable on the contracts which he made. When that distinction is borne in mind, it is plain that that decision is not applicable to the present case, where the powers exercised by the defendant are only those expressly conferred upon him by statute. For these reasons I think that the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The case resolves itself into a short point of law. No question arises as to the defendant having held himself out as being personally liable as a principal upon contracts made by him in the course of carrying on the business, and he would not be personally liable unless his legal position under the Lunacy Act, 1890, made him so, for he carefully informed the plaintiffs and others having dealings with the firm of his position. The question for us therefore is, What is the position of a person who is appointed under s. 116 of that Act to carry on the business of a lunatic not so found by inquisition? In my opinion the provisions of s. 116, sub-s. 2, and s. 124 make it clear that in carrying on the business the defendant was acting on behalf of the lunatic, and that he was really an agent appointed by the tribunal having jurisdiction in lunacy, and that he acted under the statutory powers conferred upon him by his appointment. I think, therefore, that this case comes within the class of cases of which *Owen & Co.* v. *Cronk* (1) is an example, and that it is not governed by *Burt, Boulton & Hayward* v. *Bull.* (2) The defendant is therefore not personally liable, and the appeal must be dismissed.

FARWELL L.J. I agree. The decision of this case and the explanation of the two cases which have been referred to depend upon two elementary principles: the first, that it takes two persons to make a contract; the second, that a person who contracts as agent for another is not personally liable on the contract. The first explains the decision in *Burt, Boulton & Hayward* v. *Bull* (2), where the defendant had been appointed

(1) [1895] 1 Q. B. 265. (2) [1895] 1 Q. B. 276.

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by the Court receiver and manager of the business of a company; he had no authority to act, and could not act, on behalf of the company, for he was not agent for the company, and they could not interfere with him; having, therefore, contracted without principals on whose behalf he was authorized to contract, he was held to have made himself personally liable. The appointment of a receiver and manager did not make him the agent of the company, but operated as a limitation to prevent the receiver and manager from doing more than look to the assets of the company for his indemnity. The second principle to which I have referred explains *Owen & Co.* v. *Cronk* (1) and also the present case. The contract was made by a person acting for and on behalf of, or as agent for, another, and it is an elementary rule that under such circumstances the party making the contract is not liable personally; he is not liable as a principal if he contracts as an agent.

Appeal dismissed.

Solicitors for plaintiffs: *Collyer-Bristow & Co., for W. J. Stuart, Hull.*

Solicitors for defendant: *Cunliffes & Davenport, for Moss, Lowe & Co., Hull.*

(1) [1895] 1 Q. B. 265.

W. J. B.

[IN THE COURT OF APPEAL.]

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1908
May 23.

SEAL & EDGELOW *v.* KINGSTON.

Practice—Action by Firm—Order for Discovery—Refusal of one Plaintiff to obey—Application by Co-Plaintiff for Attachment—Jurisdiction.

After the dissolution of a partnership one of the two partners commenced an action in the firm name to recover a debt alleged to be due to the partnership, and gave to the other partner, who did not consent to the action and who disclaimed all right to any sum that might be recovered, an indemnity against the costs to be incurred. An order requiring "the plaintiffs" to make a further and better affidavit of documents was served by the defendant upon the partner bringing the action, who made a further affidavit and served a copy of the order on his partner, and, on the refusal of the latter to make an affidavit, applied for an order of attachment against him on the ground of his non-compliance with the order for a further and better affidavit of documents :—

Held, that the Court had jurisdiction to make the order of attachment.

Appeal from Ridley J. at chambers.

The plaintiffs, Seal & Edgelow, were solicitors who had carried on business in partnership until December 31, 1905, when the partnership was dissolved. On November 10, 1906, the present action was commenced by Seal in the firm name against the defendant, who had been a client of the firm, to recover an amount alleged to be due from the defendant to the firm on a bill of costs. Seal acted as solicitor to the plaintiffs in the action. The defendant delivered a defence by which it was, in substance, alleged that under an arrangement made by the defendant with Edgelow the defendant was not liable to the plaintiffs for any costs.

On January 28, 1907, Edgelow took out a summons for an order that the action should be stayed on the ground that it had been brought by Seal without his authority. The Master made an order on the summons that all further proceedings in the action should be stayed until Seal had indemnified Edgelow against all costs to be incurred in the action after the date of the summons. On appeal to the judge at chambers an order was made that upon Edgelow disclaiming all right or interest in any

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sum which might be recovered in the action, and upon Seal giving him an indemnity against all costs to be incurred in the action after the date of the summons, there should be no order. On February 18 Seal gave to Edgelow an indemnity in a form approved by the latter.

On November 27, 1906, an order had been made that after defence delivered the plaintiffs and the defendant should respectively, within ten days after notice requiring an affidavit of documents, make the usual affidavit of documents; and on February 7, 1907, the defendant served notice upon Seal requiring the plaintiffs to file an affidavit of documents pursuant to this order. Seal made an affidavit of documents on March 19, 1907, but Edgelow did not make any affidavit.

On December 13, 1907, an order was made on the application of the defendant that "the plaintiffs do make a further and better affidavit as to documents in their possession within one month," and the order was served by the defendant on Seal. Seal made a further affidavit of documents, and he served a copy of the order on Edgelow, and the copy so served bore the following indorsement: "To the plaintiffs Samuel Smith Seal and John Hennen Edgelow. If you, the within-named plaintiff, John Hennen Edgelow, neglect to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the said order."

Edgelow did not make a further affidavit of documents, and the defendant then applied to have the action dismissed on the ground of non-compliance with the order of December 13, 1907, and the Master made an order that the action be dismissed unless Seal applied within seven days to attach Edgelow for non-compliance with the order.

Accordingly Seal took out a summons to commit Edgelow for contempt of Court in not having obeyed the order of December 13, 1907. Ridley J. at chambers made no order on this summons on the ground of want of jurisdiction.

Seal appealed.

J. B. Matthews, for Seal. Although Edgelow is not a willing party to the action, Seal is entitled to use his name, having

given him an indemnity against costs: *Whitehead* v. *Hughes* (1); Partnership Act, 1890, s. 38. The action is, therefore, properly constituted, and Edgelow is bound to comply with the order of December 13, 1907, for it is an order directed to the plaintiffs, which means that both plaintiffs must obey it, and having failed to obey the order he is liable to attachment under Order xxxi., r. 21. The fact that the application for attachment is made by his co-plaintiff, and not by the defendant, does not deprive the Court of its jurisdiction to enforce obedience to its order.

Colam, for Edgelow. In the circumstances of this case the Court has no jurisdiction to order the attachment of Edgelow. The action was not brought with his consent or authority, and he is not bound to assist Seal in the conduct of it. In order to found an application for attachment for non-compliance with an order of the Court it must be shewn that the order in question was addressed personally to the person sought to be attached. That is not the case here. The order of December 13 was addressed not to Edgelow personally, but to the plaintiffs, that is to say, a firm suing in the firm name. Another answer to this application is that the order in question was not obtained by the person applying for the attachment, but by the defendant, and the defendant has never served the order on Edgelow. Order xxxi., r. 21, does not contemplate the case of one plaintiff applying for the attachment of his co-plaintiff, and there is no precedent for an application of this kind.

[*Wilson* v. *Raffalovich* (2) was referred to.]

E. F. Spence, for the defendant, took no part in the argument.

SIR GORELL BARNES, PRESIDENT. I see no difficulty in this case. The only question which we have to consider is whether the judge at chambers had jurisdiction to order the attachment of the plaintiff Edgelow. We have not to consider how in the circumstances that jurisdiction, if it exists, ought to be exercised. The facts are shortly as follows. Seal and Edgelow were partners in a solicitors' business. The partnership was dissolved, and subsequently an action was commenced in the name of the firm against the defendant, who is said to have been a client of

(1) (1834) 2 C. & M. 318. (2) (1881) 7 Q. B. D. 553.

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the firm, to recover the amount alleged to be due to the firm on a bill of costs. The defence to that action is that under some arrangement made with one of the partners the defendant is not liable for any costs. Edgelow did not desire that the action should be brought or proceeded with, but Seal, contending that the firm had a good claim, thought that they ought to sue, and, as Edgelow objected to the action, Seal adopted the usual course of asserting his right to use the name of the firm for the purpose of bringing the action, and he gave Edgelow an indemnity against the costs to be incurred. The usual order for affidavits of documents having been made, the defendant on December 13, 1907, obtained an order that the plaintiffs should make a further and better affidavit of documents. The word "plaintiffs" in that order means, in my opinion, the partners in the firm of Seal & Edgelow. Seal made a further affidavit, but Edgelow did not, thus placing Seal in a position of difficulty, for the defendant thereupon applied for an order to dismiss the action on the ground that the order of December 13 had not been complied with. An order was made on that application dismissing the action unless Seal applied within seven days for the attachment of Edgelow. Within the seven days Seal took out a summons to attach Edgelow, and the summons came before Ridley J. at chambers, who thought that he had no jurisdiction to make an order of attachment.

In my opinion the learned judge had jurisdiction to make the order. It is clear upon the authority of *Whitehead* v. *Hughes* (1) that Seal had the right as one of the partners in the firm to use the name of the other partner for the purpose of bringing an action to recover a debt due to the firm, on giving his partner an indemnity against costs. As was said by Bayley B. in the case referred to, "One of several partners has a clear right to use the names of the other partners. If they object to their names being used, they may apply for an indemnity against the costs to which they might be subjected by the use of their names." In the present case an indemnity was given, and Seal was taking the proper steps to carry on the action, but Edgelow refused to assist him in the matter by making the further affidavit of documents

(1) 2 C. & M. 318.

which the plaintiffs had been ordered to make. That being the case, Seal, who was the person who had the conduct of the action, and who was a person interested in having the order complied with, was entitled to apply to the Court to enforce obedience to the order.

I am clearly of opinion that the Court has jurisdiction in this case to order the attachment of Edgelow, and the appeal will therefore be allowed. Whether or not the case is one in which an order for attachment ought to be made is a question which will have to be decided by the judge at chambers on the materials before him.

FARWELL L.J. I agree. The question raised by this case is one of pure law, whether one of two co-plaintiffs has the right to apply for an order of attachment against his co-plaintiff for non-compliance with an order requiring the plaintiffs to make an affidavit of documents. I have no doubt whatever that he has that right. The order for a further and better affidavit of documents was an order made by the Court upon both the plaintiffs. The order was served on Edgelow, indorsed with a notice that if he neglected to obey it he would be liable to process of execution for the purpose of compelling him to obey it. Whether that order was rightly or wrongly made is immaterial. Edgelow was bound to obey it unless he could get it set aside. The Court will always enforce obedience to its orders, not for the purpose of asserting its dignity, but in order that justice may be done, and the fact that in this case Edgelow's disobedience to the order has been brought to the attention of the Court by his co-plaintiff is entirely beside the question. It is obvious that where there are two partners, one of whom is endeavouring to get in the firm's assets, the other partner, who has got an indemnity against any liability for the costs of the action, must assist him by complying with an order for discovery. In my opinion the Court has ample jurisdiction to deal with this application for the attachment of Edgelow.

Appeal allowed.

Solicitor for Seal: *S. S. Seal.*
Solicitors for Edgelow: *Hennen Edgelow & Co.*
Solicitors for defendant: *R. H. Behrend & Bodger.*

F. O. R.

Distinguished. Re HONE (a bankrupt). [1950] 2 All E.R. 716.

[1908] 2 K. B. 584. MARRECO v. RICHARDSON. Distinguished. In re HONE [1951] 1 Ch. 85

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1908

May 14, 15.

[IN THE COURT OF APPEAL.]

MARRECO AND OTHERS *v.* RICHARDSON.

Limitations, Statute of—Acknowledgment—Part Payment by Cheque—Implied Promise to pay Balance of Debt—Date when Promise implied—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16)—*Statute of Frauds Amendment Act*, 1828 (9 *Geo.* 4, *c.* 14), *s.* 1.

The defendant, being indebted to his solicitor in respect of a bill of costs, handed him on May 10, 1900, a cheque in part payment of the bill; at the same interview it was verbally agreed between the parties that the cheque should not be presented for payment before June 20. On June 20 the cheque was presented for payment at the defendant's bankers, and was duly paid. On June 18, 1906, the executors of the solicitor, who had meanwhile died, issued the writ in the present action to recover the balance of the debt upon the bill of costs:—

Held, that the date of part payment of the debt was the date when the cheque was handed by the defendant to his creditor and not the date when the cheque was in fact paid by virtue of the special arrangement; that, therefore, the only time at which a promise to pay the balance of the debt could be implied from the circumstances under which part payment was made was May 10, 1900, and that, that being more than six years before the issue of the writ, a plea of the Statute of Limitations afforded a good defence to the action.

APPEAL of the plaintiffs from the judgment of Bray J. at the trial of the action at Salisbury.

The action was brought by the plaintiffs, as executors of a deceased solicitor, to recover the balance of a bill of costs due to their testator for work done by him as solicitor for the defendant upon his retainer. The facts, which were substantially undisputed, shewed that the work was done by the solicitor, and the costs incurred, at various dates between the years 1891 and 1896. At an interview between the defendant and the solicitor on May 10, 1900, a cheque for 20*l.* on account of the bill of costs was handed by the defendant to the solicitor; it was by agreement post-dated May 20, 1900. At the same interview it was further agreed that the cheque should not be presented for payment until June 20, 1900, on which day it was presented for payment and was in fact paid by the defendant's bankers. On June 18, 1906, the plaintiffs, the solicitor having died, issued the writ in the present action to recover the balance of the bill of

costs after deducting the 20*l.* paid by the defendant's cheque in 1900. The defendant pleaded that the claim was barred by the Statute of Limitations, and contended that the acknowledgment by part payment had been made on May 10, the date when the cheque was given by the defendant to the solicitor, and not on June 20, when it was in fact paid. Bray J., on the authority of *Gowan* v. *Forster* (1), *Irving* v. *Veitch* (2), and *Turney* v. *Dodwell* (3), gave judgment for the defendant. The plaintiffs appealed.

Ratcliffe Cousins and *Frank Phillips*, for the plaintiffs. There has been part payment of the debt within six years of the commencement of the action made under circumstances which imply a promise to pay the remainder of the debt, and the case is thereby taken out of the operation of the statute. The statute runs from the date of the payment of the cheque on June 20, and not from the date of its delivery to the payee on May 10. It may be that under ordinary circumstances the giving of a cheque operates as conditional payment of a debt and that that becomes an absolute payment when the cheque is met; but that principle cannot apply to a case where the delivery of the cheque to the payee is clogged with a condition that it is not to be presented for payment for several weeks. The delivery of the cheque under such circumstances is analogous to the delivery of a deed as an escrow; it is a conditional delivery only and does not amount to payment; it cannot therefore be evidence, as an absolute part payment might be, of a promise to pay the remainder of the debt. There was no part payment until June 20, for there was no allocation until that date of the defendant's funds at his bankers for the purpose of meeting the cheque. The effect of the special arrangement that the cheque should not be presented till June 20 was not only that the part payment was made on that date, but that the implied promise to pay the balance was made on that date also. Even assuming that the parties intended the delivery of the cheque on May 10 to operate as part payment, and that the delivery amounted to an acknowledgment

(1) (1832) 3 B. & Ad. 507. (2) (1837) 3 M. & W. 90.
(3) (1854) 3 E. & B. 136.

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and a promise on that date to pay the balance of the debt, there was a fresh promise to pay on June 20 implied from the payment on that date. Alternatively, the promise on May 10 to pay on June 20 may be regarded as a continuous promise, and this would be sufficient to take the case out of the statute. The cases upon the authority of which Bray J. decided the present case are distinguishable. No doubt *Gowan* v. *Forster* (1), if the cases of a cheque and a bill of exchange are on all fours, is against the plaintiffs, but that case is distinguishable because the payment relied on was by a bill of exchange accepted not by the debtor but by a third party, who made the payment by reason of his own obligation to pay and not under any authority from the debtor. In *Turney* v. *Dodwell* (2) the bill of exchange was not in fact paid, so that it was impossible to determine whether there had been a payment which took the case out of the statute. In *Irving* v. *Veitch* (3) the point was not decided. [They also cited *Ramchurn Mullick* v. *Luchmeechund Radakissen* (4) as to the distinction between a cheque and a bill of exchange.]

Holman Gregory and *Coutts Trotter*, for the defendant, were not called upon to argue.

SIR GORELL BARNES, PRESIDENT. I am of opinion that this appeal should be dismissed. The facts are simple, and the question a short one. The writ was issued on June 18, 1906, to recover from the defendant the amount of certain bills of costs said to be due from him to the plaintiffs as executors of his deceased solicitor. The charges had been incurred in the years 1891 to 1896. In 1900 they were still unpaid, and on May 10 in that year there was an interview between the deceased solicitor and the defendant. The solicitor's attendance book containing the entries for that day was put in, and, putting it shortly, what happened at the interview was that the defendant handed to his solicitor a cheque for 20*l*., post-dated May 20, and at the same time requested the solicitor not to present it for payment till June 20; when presented on

(1) 3 B. & Ad. 507.
(2) 3 E. & B. 136.
(3) 3 M. & W. 90.
(4) (1854) 9 Moo. P. C. C. 46, at p. 69.

June 20, the cheque was paid. The writ in this action was issued on June 18, 1906, two days before the expiration of six years from the day when the cheque was in fact paid on presentation. The defendant contended that the debt was statute-barred; the plaintiffs contended that the transaction I have referred to operated as an acknowledgment of the debt so as to take it out of the operation of the Statute of Limitations. No other point was taken, and Bray J. decided in the defendant's favour upon certain authorities cited before him, which the plaintiffs contend have no application to the case. When carefully examined, these authorities appear to have been rightly decided and to justify the defendant's contention.

The original Statute of Limitations (21 Jac. 1, c. 16) fixed six years as the period of limitation for a suit such as the present, but it said nothing as to the effect of part payment of the debt within that period as an acknowledgment of the whole debt; it was therefore held at first that nothing short of an express promise to pay the debt made within the six years would operate to take a case out of the statute. Later on the Courts held that a mere acknowledgment of the debt was evidence of a promise to pay it, and that part payment was equivalent to an acknowledgment; the general result of the decisions was to render it very easy to get round the statute. Then came the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), commonly called Lord Tenterden's Act, which, after reciting 21 Jac. 1, c. 16, proceeded to say, by way of further recital, "and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof"; and then it proceeds to enact "that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment

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or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby . . . . provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The result of this legislation was to leave the question of acknowledgment by part payment in the same state as before the Act. In my opinion it is clear that, where it is contended that the operation of the statute has been defeated by part payment, the mere fact of a part payment is not of itself sufficient to take the case out of the statute; there must be part payment under circumstances from which a promise to pay the whole debt can be inferred. The matter is put very clearly in Leake on Contracts, 1st ed. at p. 536, where the learned author says: "It was at first decided, under this statute, that payment of a debt or interest, when proved by a verbal admission of the debtor, was an acknowledgment by words only within the enactment, and required to be made in some writing signed by the debtor. (1) But this decision was subsequently overruled, and it is now held that an admission by the debtor of part payment, or payment of interest, is not within the enactment, and may be proved by words only without writing." (2)

The case of *Hollis* v. *Palmer* (3) well illustrates the difference between a mere payment of interest and a payment of interest under circumstances from which a promise to pay the whole debt can be implied. There it was alleged that sixteen years previously the defendant had given a promissory note for payment of a sum of money with interest, but had paid neither the amount of the note nor the interest, except interest on the note from its date up to a certain day within six years next before the commencement of the suit; the defendant pleaded the statute, which was held on demurrer to be a good defence, Tindal C.J. saying, in very clear language, "Since that statute, as before, payment of interest *may* afford an inference that the principal is still due. But how are we to know whether it is so or not,

(1) *Willis* v. *Newham*, (1830) 3 Y. & J. 518; *Waters* v. *Tompkins*, (1835) 2 C. M. & R. 723, 725.

(2) *Cleave* v. *Jones*, (1851) 6 Ex. 573.

(3) (1836) 2 Bing. N. C. 713.

unless we know the circumstances under which the interest has been paid? I think, therefore, that the declaration discloses only evidence of a cause of action, and not any actual cause of action that has not been barred by the plea, and that, consequently, our judgment must be for the defendant." In the present case the part payment relied upon was by a cheque, a negotiable instrument, and payment by cheque has always been considered to be a conditional payment; while the cheque is running, the right of action for the original debt is suspended and the payment is therefore conditional. This cheque was the acknowledgment to which the plaintiff pointed as implying a promise to pay the whole debt which would prevent the operation of the statute. But the cheque was given more than six years before the commencement of this action, and it is now contended on behalf of the plaintiffs that, because by arrangement between the defendant and his deceased solicitor the cheque was to be paid, and was paid, within six years of the commencement of the action, a fresh acknowledgment and promise to pay are to be inferred as having been made at the date of payment of the cheque. That is equivalent to saying that the bankers, in paying the cheque, made a fresh promise on behalf of the defendant to pay the whole debt. Such a contention is inconsistent with what I conceive to be the law on the subject, and in my opinion the only time when any promise to pay the whole debt was made or could be implied was when the parties met and the cheque was given.

I will only refer to two cases, which seem to support the view which I have taken. The first is *Gowan* v. *Forster* (1), where Parke J. clearly took the same view. He says during the argument (2), "The reason why a part payment takes a case out of the statute is, that it is evidence of a fresh promise. Here the promise must be considered as having been made when the bill was given, and not when it was paid"; and Littledale J. says (3), "The promise is to be implied at the time when the bill was given. The bill might be an authority to the agent to pay at another time, but no promise by the

(1) 3 B. & Ad. 507. (2) 3 B. & Ad. at p. 511.
(3) 3 B. & Ad. at p. 513.

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principal at such time." The second case is *Turney* v. *Dodwell* (1), a very strong case in favour of the defendant. I need not cite the whole case, but the following passage from the judgment of Lord Campbell C.J. (2) is very apposite: "We think that, where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill." For the reasons I have given I think that the judgment of Bray J. must be affirmed.

FLETCHER MOULTON L.J. The facts of this case are curious, but I have no doubt that the decision of Bray J. was correct. It was very early recognized by the Courts that a clear acknowledgment of the existence of a debt was an act from which a fresh promise to pay the debt might be implied, the consideration being the then existing liability to pay it. Such a promise might be proved in any way in which a promise is capable of being proved; it might be in writing, it might be oral, it might be inferred or implied from the conduct of the parties. This state of the law was found to lead to abuse, and Lord Tenterden's Act was passed, which provided that an acknowledgment or promise to pay, in order to take a case out of the Statute of Limitations, must be in writing, with the striking limitation, however, that nothing should affect the consequences arising from part payment of a debt. There is no doubt that this exception arose from the fact that the Courts had been in the habit of giving special recognition to payment of part of a debt on account of the whole as being conduct which might well amount to a recognition of the debt and enable the Courts to infer a fresh promise to pay the remainder. Lord Tenterden's Act therefore left the existing decisions as to the effect of part payment of a debt untouched. These decisions make it clear that part payment by itself, and apart from the circumstances under which it is made, does not necessarily carry with it a promise to pay the remainder; the part payment must be made under circumstances from which a promise to pay the remainder

(1) 3 E. & B. 136. (2) 3 E. & B. at p. 142.

can be inferred. It is evident that the circumstances surrounding a part payment may be such as to make it ineffectual as a new promise. If the debtor were to say "Take that, it's all you'll get," the language accompanying the payment would clearly negative any promise by him to pay the remainder of the debt.

The Courts have loyally administered Lord Tenterden's Act, but in one respect they have enlarged the effect of the proviso. They have held that the delivery of a negotiable instrument by a debtor to his creditor in part discharge of the debt is equivalent to part payment. Therefore where delivery of a negotiable instrument is made under circumstances from which there can be implied a promise to pay the remainder of the debt the case is taken out of the Statute of Limitations.

The present case is an instance of this, and when we once realize that in such a case the principle of law still survives that there may be an effective acknowledgment of a debt by conduct, any apparent difficulties in this case disappear. When was the act done from which the promise to pay the remainder of the debt may be implied? Beyond question, it was when the cheque for 20*l.* was given in part payment of the original debt; and if in this case the six years from the original creation of the debt had expired the day after the cheque was given, the giving of the cheque would take the case out of the statute, and accordingly the debt might have been sued for at any time within six years from the date of the cheque. But in this case the period of six years from the date of the cheque had expired before this action was brought, and it is now urged by the plaintiffs that, because by arrangement between the parties the cheque was not presented for payment for several weeks after it was given to the creditor, it must be taken that when the cheque was in fact paid it operated on that date as a part payment of the debt. In one sense that is true, for the 20*l.*, when paid on June 20, went towards the extinction of the debt; but that payment was only the honouring of the cheque which had been given some weeks before. The only conclusion I can draw from the facts is that on June 20 the defendant fulfilled his obligation to pay the cheque—I cannot infer from that act any

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promise made by him on that day to pay the remainder of his debt. Suppose that on May 10 the defendant had given a promissory note payable three months after date, payment could clearly not be enforced for three months;—that would be a stronger case for the plaintiffs than the present one—there can be no doubt that payment of the note at the due date would be nothing more than a discharge of the obligation entered into when the note was actually made. There would not be in that case, and there is not in the present case, any fresh act or conduct from which we could infer that the debtor was promising to pay the remainder of the debt, or was doing anything more than carrying out his obligation of honouring the negotiable instrument which he had given. The result is that there is only one act and one moment of time which can be looked at here in determining whether there has been a renewal or a prolongation of the period within which this action could be brought, and that is the giving of the cheque on May 10; but that was more than six years before the commencement of this action, and it is therefore statute-barred.

FARWELL L.J. I agree that the decision appealed from should be affirmed. The only important question in the case is the date of the part payment, for there is no written promise to pay the balance. There is no doubt the cheque was given in part payment of the debt, and if it was so given in due time, that is, within six years of the commencement of this action, the case is taken out of the statute; if not, the debt is statute-barred.

In *Pearce* v. *Davis* (1) Patteson J. says, in very terse and clear language: "The production of this cheque is not evidence of any loan; if it be evidence of anything, it is rather evidence of payment; it operates as payment, until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought." In other words, if a man pays his tailor's bill by cheque and the cheque is accepted as payment, the tailor cannot sue for his account until the cheque has been presented and dishonoured. And if the receiver of a cheque does not present it for payment

(1) (1834) 1 Moo. & R. 365.

within a reasonable time, and the bank upon which the cheque is drawn fails, the loss will fall upon the holder; and the only effect that can be given to the agreement that the cheque should not be presented until June 20 is that, if the bank had failed, the loss might in that case have fallen on the drawer. But none the less the payment is made at the time when the cheque is given, and I infer from the judgment of Patteson J. that the giving of a cheque would support a plea of payment. In the more recent case of *Felix Hadley & Co.* v. *Hadley* (1) Byrne J. held that a cheque or a bill of exchange given in respect of a pre-existing debt operated as a conditional payment thereof, and on the condition being performed by actual payment, the payment related back to the time when the cheque or bill was given. That is only expressing the same principle in another form, and I should myself prefer to say that the giving of a cheque for a debt is payment conditional on the cheque being met, that is, subject to a condition subsequent, and if the cheque is met it is an actual payment ab initio and not a conditional one. There was only one act of payment here, that on May 10, and that was out of time for the purpose of avoiding the operation of the statute.

Appeal dismissed.

Solicitor for plaintiffs: *Alfred Jonas, for Powning, Jonas & Parker, Salisbury.*

Solicitors for defendant: *Taylor, Hoare & Pilcher, for Wilson & Sons, Salisbury.*

(1) [1898] 2 Ch. 680.

W. J. B.

1908
May 15.

HARTLEY *v.* MAYOR, &c., OF ROCHDALE.

Negligence—Water Company—Liability to reinstate Pavement—Subsidence—Omission of Road Authority to rectify—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 32.

The mere passive omission by a road authority to rectify a subsidence in a road in their area which has been originally occasioned by the neglect of a water company to make good the road after having broken it up for the purposes of their undertaking does not exonerate the water company from liability for an injury caused to a person using the road by reason of the subsidence.

Appeal from the Lancashire County Court.

The action was brought by the plaintiff against the corporation of Rochdale, who were the water authority for that district, for damages for an injury sustained by her in stepping off a stop-tap water-box placed by them in the pavement of a street in their area.

It appeared that in October, 1904, an excavation was made by the defendants in the soil under the pavement, and the particular stop-tap box was removed and reinserted and the flagstones surrounding it were put down again. By their special Act of Parliament the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated, s. 32 of which provides: "When the undertakers . . . . break up the . . . . pavement of any street . . . . they shall . . . . reinstate and make good the . . . . pavement . . . . and shall after replacing and making good the . . . . pavement which shall have been so broken up keep the same in good repair for three months thereafter and such further time, if any, not being more than twelve months in the whole, as the soil so broken up shall continue to subside."

In July, 1905, the water authority instructed the Milnrow District Council to reinstate the flags which had again sunk around the water-box, and they accordingly did the work and were paid by the water authority for so doing. From that time till June, 1907, when the accident to the plaintiff happened, nothing was done to the flags either by the water authority or by the

Milnrow District Council, who were the authority in whom the road was vested.

The county court judge found that the accident happened in consequence of the pavement being out of repair, and that this had been the case since October, 1905, and that the state of the pavement was caused by the defendants not having duly performed their duty under s. 32 of the Waterworks Clauses Act, 1847. He therefore gave judgment for the plaintiff, and the defendants appealed.

Cyril Atkinson, for the defendants. If any one is responsible for the accident it is the Milnrow District Council, who are the highway authority. The responsibility of the defendants ceased in October, 1905, when twelve months had elapsed from their original interference with the pavement. It is true that the pavement had subsided again in July, 1905, but the defendants then, acting by the Milnrow District Council, whom they employed to do the work, had reinstated it, and they therefore fulfilled the duties imposed upon them by s. 32. In order to make the defendants responsible it must be shewn not only that they were negligent, but that their negligence was the proximate cause of the accident. Here the accident did not happen till 1907, and if the pavement was in a dangerous condition the cause of it was the negligence of the district council in not repairing and reinstating it. In ascertaining whose negligence caused an accident the principle is that the last conscious agency must be sought: Beven on Negligence in Law, 3rd ed. p. 53; *Heaven* v. *Pender* (1); *Scott* v. *Shepherd* (2); *Clark* v. *Chambers* (3); *Collis* v. *Selden* (4); *Winterbottom* v. *Wright*. (5) The defendants are not responsible for the projection of the water-box owing to ordinary wearing away of the pavement: *Moore* v. *Lambeth Waterworks Co.* (6); *Thompson* v. *Mayor, &c., of Brighton*. (7) [He also cited *Cavalier* v. *Pope*. (8)]

The defendants are liable under the Waterworks Clauses Act,

(1) (1883) 11 Q. B. D. 503.
(2) (1773) 2 W. Bl. 892; 1 Sm. L. C. 11th ed. p. 454.
(3) (1878) 3 Q. B. D. 327.
(4) (1868) L. R. 3 C. P. 495.
(5) (1842) 10 M. & W. 109.
(6) (1886) 17 Q. B. D. 462.
(7) [1894] 1 Q. B. 332.
(8) [1905] 2 K. B. 757.

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1847, to penalties for not reinstating the pavement properly. No action can therefore be brought against them in respect of the same matter: *Atkinson* v. *Newcastle Waterworks Co.* (1); *Walker* v. *Goe.* (2)

Brocklehurst, for the plaintiff. The county court judge has found as a fact that the pavement was out of repair at the end of the twelve months for which the defendants were responsible, and there was evidence to support his finding. *Moore* v. *Lambeth Waterworks Co.* (3) is only an authority for saying that if the defendants had handed over the pavement in good repair to the road authority they would not be responsible for any subsequent wearing away of the pavement.

The mere passivity of the road authority and the fact that they did nothing to the pavement, and apparently were not asked by any one to repair it after 1905, are not sufficient to break the chain of causation by which the defendants are responsible for the condition of the pavement.

Atkinson replied.

DARLING J. In this case I confess I have had a good deal of difficulty, but I have come to the conclusion that we cannot interfere with the finding of the county court judge. I do not think there is much evidence, but I think there is some evidence, to shew that when the defendants did the work in 1904 they did it negligently. I think there is also some further evidence that, even after what was done in 1904 was repaired in 1905, it still subsided and caused the stop-box to protrude. I think there was, therefore, some evidence on which the judge might find that the defendants had been guilty of negligence.

Then come the considerations that apply under the rule as stated by Mr. Beven (Negligence in Law, 3rd ed. p. 53). I am not at all inclined to quarrel with that rule or with the words in which he states it. I should think what he states is perfectly right; the difficulty is to see in what cases it applies and in what cases it does not apply. He says: "The principle that to fix liability for injuries brought about through a complicated state of

(1) (1877) 2 Ex. D. 441. (2) (1858) 3 H. & N. 395.
(3) 17 Q. B. D. 462.

facts, the last conscious agency must be sought; and the consideration that, if, between the agency setting at work the mischief"—that would be the defendants by what they did in 1904—"and the actual mischief done, there intervenes a conscious agency, which might or should have averted mischief, the original wrong-doer ceases to be liable, afford the clues for the unravelling the cases." Now suppose, stopping there, one applies that rule to this case. The persons who ought when a further subsidence manifested itself in July, 1905, to have remedied that subsidence were the defendants. If it was wrongly done by the persons who remedied the fault in July, 1905, then it was done by those who were employed by the defendants; and that is the same thing as saying that it was done by the defendants themselves, because it was for the defendants within the twelve months to make up the subsidence. Instead of doing it themselves, they made a contract with the road authority that the road authority should make it up, and that they would pay the road authority. It is true, therefore, that the road authority did the work and was "conscious" as far as a road authority can be conscious; but in doing what they did they were acting not as a road authority, but as the servants of the defendants themselves. Therefore I think that on that ground the rule indicated by Mr. Beven would not help the defendants.

But further Mr. Beven says: "On the other hand, it must be borne in mind that, though there may intervene various stages in the development of the mischief, yet, if none of these is due to a conscious volition, the last conscious agent continues to be liable." After July, 1905, we have the road authority not acting as servants of the defendants at all, but acting, or omitting to act, on their own responsibility and in their capacity of road authority, and we have to see whether this suggestion of Mr. Beven fits the case. Now what they did was simply nothing. If there was, owing to the negligence of the defendants, a mischief at work, the simple fact is that the road authority did nothing to remedy it. To my mind it is difficult to see how, in not making good the mischief which from the original fault of the defendants was from day to day causing injury to the road, the road

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Darling J.

authority were exercising conscious volition. It may be that they were asleep, in the sense in which the law calls people asleep who are not performing their duties or exercising their rights, but if people are asleep they are not exercising a conscious volition. I think, therefore, that there is no evidence to shew that when they were liable to do something on their own behalf the road authority were exercising any sort of conscious volition in not doing it. It seems to me that at the most they are simply shewn to have done nothing, and the reason why they did nothing is not in the least explained. I should require, in order to apply this rule, to see that it was brought home to them that they ought to do something and that they refused to do it. In that case, one would easily say that the real negligence which caused the injuries to the plaintiff was not what was done years ago, but was the conscious refusal of the road authority to take any steps to prevent the original negligence of the defendants from having any effect. I think that the rule suggested by Mr. Beven, which I accept because he does not put it as a rule of his own, but only as a deduction from decided cases, might be a very proper and useful one, since otherwise people who had committed some small fault say twenty years ago might still be liable because they omitted to do something as much as twenty years ago, although after their act other people ought to have intervened and to have done something which they of purpose had not done.

With regard to *Atkinson* v. *Newcastle Waterworks Co.* (1) I do not think it applies in this case. I do not think that because there is the power to sue the defendants for penalties they are not liable to be sued for negligence in the doing of the work, provided it be proved that that negligence resulted in injury to a plaintiff.

PHILLIMORE J. I am of the same opinion. I agree with my brother that the evidence is slight, but I also agree that it is sufficient to support the judgment of the county court judge. If this stop-box, which I presume is of metal, had been properly lodged in the highway by the defendants, and they had made

(1) 2 Ex. D. 441.

good not only at first, but within their period of liability, any subsidence of the ground around it which they had had to remove, so that it would not subside shortly afterwards, and if the inequality in the road was due to the unequal wearing of metal and stone or the inequality of resistance of the earth with the brick and masonry under the iron, then, according to *Moore* v. *Lambeth Waterworks Co.* (1) and to general principles, the defendants would not be liable; they would have lawfully put in the road something which they had a right to put there, and the inequality would be merely the effect of wear and tear, which the highway authority ought to make good. But here the county court judge has found, and there was evidence to support his finding, that the defendants put back the ground in such a way that there was a subsidence within their year of liability, and that that subsidence was not effectively made good within that year. I must point out that it will not do to say "I came in and reinstated, by myself or by my contractor, and made the ground up level again," if the ground is so badly made up that in a brief period of time the inequality revives. It is the duty of the water company to reinstate and to leave its reinstatement in such a condition that no further reinstatement will be required and that the inequalities will only be produced by the natural consequences of wear and tear.

That, being in my view the case here, really answers all the points that have to be decided; but I will deal a little more specifically with the point most relied upon. It was rightly contended that it was the duty of the highway authority after the year was over to make good any inequality whether due to defects in the original construction by the water company or to a defect in its subsequent reinstatement or to any other cause, wear and tear or anything else. That was also its duty during the year, not the less its duty to the public because the water company were also under the duty. But if the water company has left that which either is or will in a short time become an irregularity in the road, and which then becomes a cause of mischief to a passer-by, the water company is in my opinion none the less liable to the passer-by because there is another authority which

(1) 17 Q. B D. 462.

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either contemporaneously or subsequently has a duty to keep the road level. Where an injury is occasioned by the joint result or the compound result of two torts committed one after the other, the original tortfeasor as a general rule is not liable because but for the second tort the injury would not have happened; but as far as I am aware there is no authority for saying that a non-actionable wrong such as the passive neglect of a highway authority breaks the chain of liability. If a man does that which obstructs a highway he is liable for the consequences of an injury sustained by somebody lawfully passing on the highway, even though there was time for the highway authority to have removed that obstruction, and though the highway authority neglected to remove it.

With regard to the third point the cases are cases between the consumer and the authority which supplies the water or the gas; they have no relation to and no bearing upon cases where the action is altogether outside the relation of supplier and consumer and is brought by somebody who is simply complaining that as he passes along the highway he falls over an obstruction which has been created by the water authority in the course of performing its duty of supplying water.

I have passed over one point that my brother perhaps has dealt with more fully. The reinstatement in this case which the county court judge has held to be defective in July, 1905, was a reinstatement by the highway authority; but, as Mr. Atkinson very fairly said, he could not rely upon that; the highway authority in that respect was acting as an agent for, or contractor with, the water company, and the water company is bound by the carelessness of the highway authority in doing that just as it would be bound by the carelessness of any builder or other contractor whom it employed.

For these reasons I agree with my brother that this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *W. H. Hickson, Rochdale.*

Solicitors for respondent: *Indermaur & Brown, for Sager, Todmorden.*

A. P. P. K.

HALES *v.* KERR.

1908
July 3.

Evidence—Negligence—Negligent Course of Conduct—Dangerous Practice—Single Act or Omission—Evidence of similar Acts or Omissions.

The plaintiff in an action of negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber, in using razors and other appliances in a dirty and insanitary condition. In support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop:—

Held that, as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of these witnesses was admissible.

APPEAL from the judge of the county court of Surrey holden at Kingston.

The plaintiff was employed as a billiard-room manager. The defendant kept a barber's shop. The plaintiff in his particulars of claim alleged that he employed the defendant to shave him between September, 1906, and October 9, 1907, and that by reason of the negligence of the defendant or his servant in using razors and other appliances in a dirty and insanitary condition the plaintiff on or about October 9, 1907, contracted a disease known as barber's itch, which incapacitated him from following his employment as a billiard-room manager. The plaintiff claimed 30*l.* damages, including medical expenses and loss of earnings.

The plaintiff deposed that on October 9, 1907, he went to the defendant's shop to be shaved; that a barber in the defendant's employment, while shaving the plaintiff, cut him slightly on the throat and then rubbed the cut with a towel and applied a powder-puff; that very soon afterwards the cut became inflamed, and that a disorder known as barber's itch, or ringworm of the beard, subsequently developed. He stated that he had never visited any barber's shop other than the defendant's, and his testimony went to negative the possibility of his having contracted the disorder from any other source. The doctor who attended the plaintiff stated that he had examined him on October 12 and found a distinct ringworm on his neck; and that any instrument which was unclean might have transmitted the

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microbe of the disease. He further stated that, in his opinion, antiseptics ought to be used, and that if reasonable precautions are taken there is very little risk of infection.

Two witnesses, named Cheverton and Currie, called for the plaintiff stated that in September, 1907, they had been shaved at the defendant's shop and had contracted the same disorder. One of these witnesses had been cut in two places by a razor; the other had suffered an abrasion of the skin, to which a towel and powder had been applied. The evidence of these two witnesses was objected to by counsel for the defendant, but was admitted by the county court judge as bearing on the allegation that the defendant was guilty of negligence in not keeping his razors and other appliances clean.

The county court judge gave judgment for the plaintiff for 10*l.* 10*s.*

The defendant appealed.

Ernest Todd, for the appellant. The evidence of the witnesses Cheverton and Currie was not admissible. The plaintiff complains of a negligent act or omission causing him an injury and damage on October 12. Other negligent acts or omissions causing injury and damage to other persons in September are res inter alios actæ and collateral to the cause of action, and evidence relating to them is not admissible: Taylor on Evidence, 10th ed. (1906) vol. 1, p. 251, s. 318; *Holcombe* v. *Hewson*. (1) It is common knowledge that if a man is charged with having committed an indictable offence on a particular date evidence cannot be admitted shewing that he committed a similar offence on another date. And so of an act of negligence; the fact that an omnibus driver ran over a man on January 1 is no evidence of negligent driving on January 8.

Without the evidence of these witnesses there was no evidence of negligence on the part of the defendant. The rest of the evidence is equally consistent with the absence and with the existence of negligence: *Cotton* v. *Wood* (2); *Wakelin* v. *London and South Western Ry. Co.* (3)

(1) (1810) 2 Camp. 391. (2) (1860) 8 C. B. (N.S.) 568.
(3) (1886) 12 App. Cas. 41.

Herbert Jacobs, for the respondent. The evidence of facts which, though collateral, are proved to be connected by some general link with the matter in issue, is admissible: Taylor on Evidence, 10th ed. vol. 1, p. 252, s. 320. The question is, What is the matter in issue? Admitting that the plaintiff complains of a negligent act or omission on October 9, causing him an injury and damage, the plaintiff says that the negligent act or omission of the defendant was not a single act or omission on that day, but a habitual practice of keeping his razors and appliances in a dirty and infectious condition. If in an action against an omnibus company the negligence alleged is one act of careless driving on the part of the driver, it may be admitted that evidence cannot be given of another act of careless driving; but if the negligence alleged is that the company keep omnibuses with weak axles it is submitted that evidence of other accidents from that cause would be admissible. To prove the dangerous condition of a dock whereby the plaintiff was injured evidence of other persons being injured in the same way is admissible: *Moore* v. *Ransome's Dock Committee*. (1) So to prove the dangerous character of a heap of earth and refuse placed by the defendant upon his land adjoining a highway evidence is admissible to prove that horses other than the plaintiff's horse have been frightened by it: *Brown* v. *Eastern and Midlands Ry. Co.* (2) The evidence was admissible to prove what the plaintiff alleges, namely, a dangerous practice carried on by the defendant, or a habitual neglect by him to cleanse his razors and other appliances, which was likely to cause damage to customers and which did in fact cause damage to the plaintiff.

Ernest Todd in reply.

CHANNELL J. I think myself that even without the disputed evidence there was sufficient proof of negligence to warrant the county court judge in finding for the plaintiff. If, however, the disputed evidence is inadmissible, there must be a new trial, because one knows not how it may have influenced the mind of the learned judge.

Then was this evidence admissible? The fact that this barber's

(1) (1898) 14 Times L. R. 539. (2) (1889) 22 Q. B. D. 391.

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Channell J.

rash appeared soon after the plaintiff had been cut, and in the near neighbourhood of the cut, is evidence that the disease was contracted in the defendant's shop from the use of something that was infected—a razor or a towel or some other appliance. It is clearly evidence of negligence in a barber to use appliances of this kind, which have already been in use on other persons, without taking means to insure that they are thoroughly cleansed. So in the case of a razor. It is evidence of negligence in a barber not to keep his razors clean. With regard to the doctor's evidence, considering the circumstances and the way in which the question was put to him, and bearing in mind what one knows of the practice of cautious persons in the defendant's business, the view I take is this, that in the doctor's opinion antiseptics ought to be used for cleansing the razors in a barber's shop. Then if there is evidence that a practice prevails in the defendant's shop of cleansing his razors and appliances in a particular way, and a question arises whether that practice is a dangerous one, evidence to shew that a similar practice in other barbers' shops had led to the communication of disease, and was therefore dangerous, would be admissible. If so, evidence to shew that the practice had led to the communication of disease in the defendant's own establishment would be equally admissible. This question of the admissibility in evidence of other instances of a neglect or default complained of frequently arises both at nisi prius and in criminal cases. In the latter case the rule is well settled that evidence is not admissible to prove that a person charged with an offence on a particular occasion has committed a similar offence on a former occasion, the evidence being tendered to shew that he is a likely person to have committed the offence with which he is charged. On the other hand, where the allegation is of a practice to do or omit to do a particular act, and the material issue is the existence or non-existence of the alleged practice, evidence that the act or omission has happened on several occasions is always admissible to shew that its happening on a particular occasion is not a mere accident or a mere isolated event. In civil proceedings the rules are not dissimilar. It is not legitimate to charge a man with an act of negligence on a day in October and to ask a jury to infer

that he was negligent on that day because he was negligent on every day in September. The defendant may have mended his ways before the day named in October ; moreover, he does not come to trial prepared to meet all the allegations of previous negligence. There are many reasons why such evidence is not admissible on such an issue. But where the issue is that the defendant pursues a course of conduct which is dangerous to his neighbours it is legitimate to shew that his conduct has been a source of danger on other occasions, and it is a legitimate inference that, having caused injury on those occasions, it has caused injury in the plaintiff's case also. No doubt in a trial at nisi prius the judge must exercise great care and caution in the admission of such evidence as this, so as to avoid prejudicing the defendant's case. In the present case I think the evidence of the two witnesses Cheverton and Currie was admissible on the ground that it went to establish a dangerous practice carried on in the defendant's establishment. The appeal must therefore be dismissed.

SUTTON J. I agree. I think the evidence was admissible as shewing that the razors or other appliances used in the defendant's shop were not properly cleansed and were dangerous.

Appeal dismissed.

Solicitors for appellant: *Chamberlain & Co.*
Solicitor for respondent: *G. E. H. Bellingham.*

W. H. G.

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April 1, 2.

[IN THE COURT OF APPEAL.]

RUGBY PORTLAND CEMENT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Mines—Compensation—Purchase—Limestone required to be left unworked—3 Will. 4, c. xxxvi., ss. 54, 55, 58.

By a private Act, passed prior to the Railways Clauses Consolidation Act, 1845, authorizing the construction of a railway and containing the usual provisions for the acquisition of lands, mines and minerals (including by name limestone) were excepted out of the purchase of lands, but it was provided that, upon receipt of a twenty-one days' notice from the proprietor of any mines or minerals lying under or within forty yards of the railway of his desire to work them, the railway company might purchase them or any part of them.

The claimants were the owners in fee of land on both sides of the railway and of limestone lying under their land and under the railway; they had a cement manufactory on their land, in which they used and turned into cement the limestone which they quarried. Owing to the cost of carriage the limestone when quarried had no market value as an article of commerce other than its value to the claimants for use in their adjacent manufactory. The claimants, having in the ordinary course of quarrying approached close to the forty yards limit, gave notice to the railway company of their intention to work the limestone within that limit, and the railway company gave separate notices to treat in respect of the limestone within that limit, but not under the railway, and of the limestone actually under the railway, and the amount of compensation was referred to arbitration:—

Held, (1.) that as the limestone had no market value in the strict sense of that term, its value to the claimants was what they might fairly be expected to have made out of it by working it in the ordinary and reasonable manner in which it would have been worked but for the notices to treat; (2.) that the profits which the claimants would have made by turning it into cement might properly be taken into consideration by the arbitrator as an indication, though not as a measure, of that value; and (3.) that the value was not affected by the fact that the claimants owned large quantities of other limestone which they might have worked instead of the stone in question.

The Act provided that, after its passing, no shaft, pit, or quarry should be dug, sunk, or made "in or on" the railway. With respect to the limestone lying under the railway, the arbitrator found that the claimants, by entering upon their property, could and would have worked and gotten the stone without going on to the surface of the railway, but the effect would have been to cause the subsidence of the rails and ballast:—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Kennedy L.J. dissenting), that such a mode of working would have involved the

making of a quarry "in," though not "on," the railway, and would have been in contravention of the statute, and that therefore the limestone under the railway had no assessable value.

Decision of Bray J., [1908] 1 K. B. 925, reversed.

Eden v. *North Eastern Ry. Co.*, [1907] A. C. 400, discussed.

APPEAL from a judgment of Bray J. upon an award stated by an arbitrator in the form of a special case, reported [1908] 1 K. B. 925. The following statement of facts is, in substance, taken from the written judgment of Bray J.

The Rugby Portland Cement Company, called in the award the claimants, claimed a large sum from the London and North Western Railway Company for the purchase by the railway company of certain limestone and minerals specified in two notices to treat given by the railway company, dated May 28, 1895, and August 22, 1896. The members of the firm or company had changed since the dates of these notices to treat, but nothing turned upon this, and the notices to treat were considered as having been given to the claimants, and as if they had been the owners from 1894 onwards. This claim being disputed, it was agreed between the parties that the amount to be paid should be ascertained by the award of an arbitrator, instead of by the verdict of a jury, as provided by the Act, and, questions of law having been raised in the course of the arbitration, the arbitrator stated his award in the form of a special case.

The material facts are as follows: In the year 1833 the London and Birmingham Railway Company, the predecessors in title of the London and North Western Railway Company, obtained an Act of Parliament, 3 Will. 4, c. xxxvi., authorizing them to make a railway from London to Birmingham and to acquire lands for that purpose. Under the provisions of this Act they obtained land from the predecessors in title of the claimants, all coal, ironstone, limestone, stone, slate, clay, or other mines or minerals being excepted under s. 54 from the purchase and conveyance of the lands. (1) At some time previous to 1894 the

(1) 3 Will. 4, c. xxxvi., s. 54: "And be it further enacted, That nothing in this Act contained shall extend to give to the said company any coal, ironstone, limestone, stone, slate, clay, or other mines or minerals under any lands purchased by the said company under the provisions of this Act, except only so much of such coal, ironstone,

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claimants had erected a cement manufactory on lands adjoining the lands so acquired, and were quarrying the limestone thereunder and manufacturing it into cement. They were owners in

limestone, stone, slate, clay, or other mines and minerals as may be necessary to be dug or carried away or used for the purposes of this Act; but all such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals not necessary to be so dug, carried away, or used as aforesaid shall be deemed to be excepted out of the purchase of such lands, and may, subject to the restrictions hereinafter contained, be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said company, as if this Act had not been passed."

Sect. 55: "Provided always, and be it further enacted, That when and so often as the proprietor or lessee or tenant of any mines of coal, ironstone, limestone, stone, slate, clay, or other mines and minerals lying under the said railway and works or any of them, or within the distance of forty yards from such railway or works respectively, shall be desirous of working the same, then and in every such case such proprietor, lessee, or tenant shall give notice in writing to the said company under his hand of such intention, at least twenty-one days before he shall begin to work such mines, and upon the receipt of such notice it shall be lawful for the said company to inspect or cause such mines to be inspected, and to contract and agree with any such proprietor, lessee, or tenant for the purchase, and to purchase, any such mines, or any part thereof, the getting and working of which may appear likely to prejudice or damage the said railway or other works; and in case the said company and such proprietor, lessee, or tenant do not agree as to the amount or value of such mines, the same shall be ascertained and settled by the verdict of a jury as is hereinbefore directed with respect to the lands which may be taken for the purposes of this Act: Provided nevertheless, that in case the said company do not, before the expiration of such twenty-one days, declare their desire to purchase the said mines, and treat with such proprietor, lessee, or tenant for the same, then it shall be lawful for the proprietor, lessee, or tenant of such mines, and he is hereby authorized, to work and get such part of the said mines as lie under the said railway and other works, or within the distance aforesaid, without being liable to the said company for any damage that may be done thereby."

Sect. 58: "And be it further enacted, That from and after the passing of this Act no shaft, pit, or quarry shall be dug, sunk, or made in or on the said railway: Provided always, that it shall be lawful for any proprietor, lessee, or tenant of any mines or works on each side of the said railway, to fix all such ropes, chains, connection rods, and other matters as may be necessary for working the said mines, in conformity with the provisions of this Act, over, under, across, near, or by the said railway, provided that by so doing such proprietor, lessee, or tenant do not injure such railway, or interrupt in any manner the free passage upon or along the same."

Sect. 78 of the Railways Clauses Consolidation Act, 1845, is sub-

fee simple of these lands and of the minerals thereunder, and also of the minerals which had been excepted from the purchase by the railway company from their predecessors. On November 10, 1894, they gave a notice or notices to the railway company under s. 55 that they intended to work certain limestone and minerals under and near the railway, and this led to the two notices to treat. The first notice related to stone near to but not under the railway, called in the award "the first notice stone," and the second to stone under the railway, called "the second notice stone."

It was agreed between the claimants and the railway company that, for the purposes of the award, November 1, 1895, should be deemed to be the date on which the first and second notices to treat were given.

By paragraphs 2 to 5 inclusive of this award the arbitrator found as follows: "(2.) The said limestone including the stone the subject of the first notice to treat hereinafter called 'the first notice stone,' and the stone the subject of the second notice to treat hereinafter called 'the second notice stone,' allowing for considerable increase in the claimants' business, was sufficient for the purposes of their cement manufactory for a period greatly exceeding twelve years from November 1, 1895. The limestone not included in the said notices to treat was equally convenient and accessible to the claimants as the said first notice stone and second notice stone.

"(3.) The claimants in the ordinary and reasonable course of quarrying would, but for the said notices to treat, have worked the first notice stone and second notice stone, and would have used it in their manufactory during a period of twelve years from November 1, 1895, and by the use thereof would have made considerable profits.

(4.) By reason of the said notices to treat and the fetter thereby attached to the first notice stone and the second notice stone, the claimants have for the purposes of their business had

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stantially the same as s. 55 of the private Act of 1833, except that the railway is to "make compensation" for the mines, the word "purchase" not being used, and that thirty days' notice of intention to work the mines must be given.

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recourse to and have worked the stone not fettered by the said notices to treat, and have made and are in a position to make the same profits thereout until the same is exhausted as if they had been able to work the first notice stone and second notice stone.

"(5.) With respect to the second notice stone, I find as follows, that is to say:—the claimants by entering upon their own property could and would have worked and gotten the said stone without going on to the surface of the railway, but the effect of so working and getting the stone would have been to cause the subsidence of the rails and ballast of the railway. If the claimants were under obligation to maintain the said rails and ballast undisturbed by the working and getting of the said stone the cost necessary to fulfil such obligation would have rendered the working of the said stone commercially impracticable."

With regard to both sets of stone, the claimants contended before the arbitrator that the value of the stone to them, as the owners, was to be assessed on the basis of what they might fairly be expected to have made out of it by working it in the ordinary and reasonable manner in which it would have been worked but for the notices to treat. The railway company contended, with regard to both sets, (1.) that the value of the stone was the value if offered for sale on November 1, 1895, in the open market, the claimants being possible competitors therefor; (2.) that if it were held that the value of the stone should represent indemnity to the claimants for all loss to them consequential on the taking of the property, the arbitrator was entitled to take into account the fact that the profit which by ordinary and reasonable working would have been earned by the claimants by getting and using the first and second notice stone might for a long period of years be earned by their getting and using the other stone lying under their property. With regard to the second notice stone, the railway company further contended that the getting and working of the stone under the conditions prescribed would have been in contravention of s. 58 of 3 Will. 4, c. xxxvi. Having thus stated the contentions, the arbitrator proceeded to fix the values of the stone according to the different contentions, namely, 523*l.* for the first notice stone and 896*l.* for the second notice stone if the railway company's first or second

contention were correct, and 6074*l.* and 9180*l.* respectively if the claimants' contention were correct, and, in respect of the second notice stone, nothing at all if the railway company's last contention were correct.

Bray J. found that the amounts to which the claimants were entitled were the sums of 523*l.* and 896*l.* Both parties appealed.

Cripps, K.C. (*A. T. Lawrence* with him), for the claimants. As regards the first notice stone, the judgment of Bray J. proceeded upon a wrong basis. The correct principle is that laid down by the House of Lords in *Eden* v. *North Eastern Ry. Co.* (1), which governs this case: the assessment must proceed upon the basis that the railway company are purchasing the minerals as to which they have given notice to treat; purchase, and not merely indemnity, is indeed the basis provided by s. 55 of the railway company's Act of 1833, under which these proceedings are taken. It is true that *Eden* v. *North Eastern Ry. Co.* (1) was decided upon s. 78 of the Railways Clauses Consolidation Act, 1845; but there is no material difference between that section as interpreted in that case and s. 55 of the Act of 1833. The purchase price of the limestone is its value to its owners, the claimants, assessed on the basis of what they might fairly be expected to have made out of the property by working it in an ordinary manner, had there been no notices to treat. There is a further distinction between *Eden* v. *North Eastern Ry. Co.* (1) and this case: the mineral in the former case was coal, which always has a market value at the pit's mouth, namely, the difference between its selling price and the cost of working it and getting it to the surface; limestone, however, owing to the heavy cost of carriage, has no market value in that sense of the term, and one has to ascertain its value for the purpose of the business which the claimants carry on at the spot. It is admitted that that value is not the profit which the claimants would have made by manufacturing the limestone into, and selling it as, cement; but the profits of the business may properly be considered by the arbitrator as a guide in arriving at the value of the limestone for the purposes of the business, though it is not the measure of

(1) [1907] A. C. 400.

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that value. The judgment of Bray J. seems to read into the special case a statement that is not in fact there, to the effect that the claimants are endeavouring to obtain a manufacturer's profit as being the value of the stone; this was not their contention, nor was it the ground upon which the arbitrator assessed the value of the stone according to the claimants' contention in his award. Further, in assessing the value of the stone, the tribunal cannot go outside the particular property comprised in the notice to treat; it cannot place a smaller or depreciated value upon the stone taken merely because the claimants might equally well have worked the stone in other parts of their property, especially seeing that they had come to this particular stone in the ordinary course of their working of this quarry.

As to the second notice stone, the contention of the railway company that it had no assessable value because its working would have constituted an infringement of the provisions of s. 58 of the Act of 1833 is untenable. The effect of those provisions is to prevent the claimants from working the stone underneath and supporting the railway by going on the surface of the line and sinking a pit or making a quarry there, as may be done under the Railways Clauses Consolidation Act, 1845, where the railway company does not take any steps towards ascertaining the compensation: *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (1) They also prevent their placing anything on or across the railway which would obstruct the traffic. But those provisions do not prevent their getting the stone by cutting into it from below and so carrying it away, even though the effect of such working or quarrying may ultimately be to let down the surface of the railway above. If the two values are respectively ascertained upon the proper basis, the claimants are entitled to the two sums of 6074*l.* and 9180*l.* found by the arbitrator.

Page, K.C. (*Tweedale* with him), for the railway company. The learned judge was right in rejecting the contention of the claimants as to the mode in which the value of the limestone was to be arrived at; that contention was in substance based upon the suggestion that, as they would have turned the

(1) [1893] 1 Ch. 427.

limestone into cement, they were entitled to be paid the profits which they would have made as cement manufacturers out of the particular limestone which they were restrained from getting. In his award the arbitrator took those profits as the measure of the value of the stone and not merely as a guide in arriving at that value. In one aspect *Eden* v. *North Eastern Ry. Co.* (1) is distinguishable from the present case, for coal has a market value as coal at the pit's mouth, while limestone has no such value, and practically has no value except for certain limited purposes. From another point of view that case is in favour of the railway company, for it shews that the question for determination is the value of the minerals required to be left unworked—that is to say, in the present case, their purchase value. That value is what the limestone would have sold for, less the cost of getting it, and that was the value determined by the arbitrator in fixing the respective amounts of 523*l.* and 896*l.* As regards the first notice stone Bray J. has rightly held that 523*l.* is the amount to which the claimants are entitled upon the findings in the award.

In respect of the second notice stone the claimants are entitled to nothing. It is found in paragraph 5 of the award that they could have worked the stone without going on to the surface of the railway, but that the effect of working and getting it would have been to cause a subsidence of the rails and ballast. That means that they would work under and through the embankment and let the surface down, forming a quarry in the railway. Such a mode of working would be in contravention of s. 58 of the Act of 1833, which forbids any shaft, pit, or quarry being dug, sunk, or made "in or on" the railway. The judgment of Bray J. gives no effect to the word "in."

Cripps, K.C., in reply. The effect of s. 58 is merely to prevent the claimants from going on the surface of the railway and digging or putting machinery there, which, but for that section, they might have done. The contention of the railway company is that the claimants are prevented altogether from working the second notice stone; the claimants contend that they may work it subject to the limitations of s. 58. It cannot be successfully contended that the

(1) [1907] A. C. 400.

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claimants, by getting their stone from below the railway, would be making a quarry "in" the railway.

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SIR GORELL BARNES, PRESIDENT. This case raises two questions as to the mode of assessing the purchase price for certain limestone belonging to the claimants as owners in fee and lying alongside and under the line of the London and North Western Railway; the two questions arise upon two notices to treat given in respect of the stone lying within a certain distance of the line and of the stone lying underneath it respectively. [His Lordship read the material parts of the special case, and proceeded:—] The point raised in the claimants' appeal as to the first notice stone is that in substance the case is governed by the recent case of *Eden* v. *North Eastern Ry. Co.* (1) Bray J., however, held that that decision did not apply. The learned judge said: "It certainly lays down the principle that the railway company are bound to pay in any case the full fee simple value of the minerals, and nothing less, notwithstanding any special relations that may happen to exist between lessor and lessee, but, as I read that case, the claimants there did not contend that the coal had any special value to them, and the House of Lords had not to consider whether the special position of the lessees might not have been a fit and proper element for consideration, if they had been claiming that the minerals had a special value to them beyond what they would have to others, and I do not think that case is an authority one way or the other upon the points that are really in controversy here." He then proceeded to deal with the case on grounds with which I regret that I am unable to agree.

In substance I think that this case must be decided upon the principles laid down by the House of Lords in *Eden* v. *North Eastern Ry. Co.* (1) The head-note to that decision runs: "The compensation payable by a railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, in respect of such mines as they require to be left unworked is the full value of the minerals required to be left unworked, namely, what the minerals would have sold for if worked, less the cost of working them." That

(1) [1907] A. C. 400.

decision adopted the contention of the coal company at the trial before Bigham J. (1), which was in these terms: "The coal company, on the other hand, contend that the proper measure of compensation which they are entitled to receive from the railway company is the amount of money which it is admitted that they would have made by the working of the reserved coal if such coal had not been required by the railway company to be left unworked." I need not go through the judgments in *Eden* v. *North Eastern Ry. Co.* (2), and I can only notice two points of difference between that case and the present. That case was under s. 78 of the Railways Clauses Consolidation Act, 1845, which provides that "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same," &c., and the compensation there referred to was held to be the value of the minerals required to be left unworked, that is, what they would have sold for if worked, less the cost of working them. In the present case the words dealing with compensation are to be found in s. 55 of the railway company's private Act of 1833; they give the railway company power "to contract and agree with any such proprietor, lessee, or tenant for the purchase, and to purchase, any such mines, or any part thereof, the getting and working of which may appear likely to prejudice or damage the said railway or other works." It seems to me that the meaning which the House of Lords in *Eden* v. *North Eastern Ry. Co.* (2) gave to the word "compensation" is substantially the same as that which is to be gathered from s. 55 of the Act of 1833, and that what is to be ascertained is in principle the same in both cases.

Another point of difference is that in that case the mineral dealt with was coal, which after being raised to the surface would presumably not be used by the colliery company, but would be sent away and sold, and for which there was necessarily a market value at the pit's mouth. The present case is somewhat different. Having regard to the nature of the material and

(1) [1906] 1 K. B. 195, at p. 197. (2) [1907] A. C. 400.

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of the business, limestone cannot be said to have a market value strictly speaking—at any rate not a value which could be got by profitably dealing with the stone in the market; we must therefore consider what value should be placed on it, having regard to the principles indicated in *Eden* v. *North Eastern Ry. Co.* (1) It seems to me that, if limestone cannot be sold with any profit because of the cost of conveyance, the value to which regard must be had is its value to the owners, in this case the claimants, at the spot where they have it and intend to use it, and the real difficulty in this case is how that value is to be assessed. The contention of the claimants, as stated in the special case and adopted by the arbitrator, is that its value is to be assessed on the basis of what the cement company might fairly be expected to have made out of the property by working it in the ordinary and reasonable manner in which it would have been worked but for the notice to treat; by which I understand that the award proceeds on the basis of the value to the cement company of the stone when got by them, less the cost of getting it. It is suggested that the arbitrator has taken into consideration the profits which would have been made by turning the stone into cement, and that he must have dealt with the matter on that footing; but I cannot put that construction on the language of the award. I think that the arbitrator may possibly have arrived at his figures by taking into consideration the profit that would have been made out of the limestone by the claimants as an indication of its value to them, but not as the measure of that value. I think, therefore, that on this part of the case the claimants are entitled to the value of the limestone on the basis of their contention, and that both the contentions of the railway company are in conflict with the decision of the House of Lords in *Eden* v. *North Eastern Ry. Co.* (1) The award must therefore be for 6074*l.* with interest.

I now come to the cross appeal as to the second notice stone, which is thus dealt with in the award: "It was contended on behalf of the railway company that under the conditions hereinbefore described the getting and working of the second notice stone would have been in contravention of 3 Will. 4, c. xxxvi.,

(1) [1907] A. C. 400.

s. 58. If this contention be right I award nothing in respect of the second notice stone; if wrong, I repeat the contention hereinbefore set forth with respect to the first notice stone, substituting therefor the second notice stone." Obviously we have first to settle whether that contention is right, for, if it is, the award will be nil in respect of this particular stone. The question depends upon the construction to be placed upon s. 58, but that section must be considered in conjunction with ss. 54 and 55. My view, stated shortly, is that the restrictions contained in ss. 55 and 58 are the restrictions referred to in the closing part of s. 54. [His Lordship read the sections, and continued:—] The railway company contend that the claimants are restricted by s. 58 from doing that which they propose to do, while the claimants contend that that section has no application. Now it is perfectly true that the arbitrator finds that this second notice stone could be worked without going on the surface of the railway, but the plans and sections, which shew that the railway runs partly in a cutting and partly on an embankment, shew also that in certain places the limestone crops out, or very nearly crops out, on the very surface of the railway. It may be true that the claimants could work this stone without actually going on the surface of the line, but the way in which it could be worked would have the same practical effect as if they had gone on the surface and worked downwards, for the effect of working this stone by quarrying through the railway would be to bring down the whole railway, which would have nothing left to support it, even if in certain places there might be a small quantity of superincumbent stone above that which is actually worked. The claimants contend that they have a right to do this, and that they do not come within the restrictions of s. 58, which provides that "no shaft, pit or quarry shall be dug, sunk or made in or on the said railway." It is a curious fact that the Railways Clauses Consolidation Act, 1845, contains no section corresponding to s. 58 of the Act of 1833. My view is that the contention of the railway company is right. Looking at s. 55, I think its general object is this. A mine may pass under this railway at some depth, and its working may involve no damage to the railway: the railway company has power to

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inspect it and see what is going on: if they are satisfied that there is no risk, the mining may proceed: if they feel doubtful, the railway company may take over the land and compensate by paying the value of minerals; the mining will then stop, and the company will purchase the mines. But s. 58 seems to deal with an entirely different matter: it deals with that which is really on the surface, which is in or on the railway; and I think it was intended to prevent actual interference with the railway either by digging into it from the surface or by picking and cutting into and under it from the side, and so leaving the line suspended. I do not think that Bray J. has given any adequate meaning to the words at the commencement of s. 58, more especially to the word "in." In my opinion, therefore, no sum should be awarded to the claimants in respect of the second notice stone.

FARWELL L.J. I am of the same opinion on both points. The Act that we are construing is one of the early railway Acts and is not quite identical in phraseology with the later general Acts, the Lands Clauses and Railways Clauses Consolidation Acts. The first question is as to the mode of ascertainment of the "amount or value of such mines," the word "amount" relating, as I understand it, to the quantity, and "value" to the money value. It has been pointed out in *Eden* v. *North Eastern Ry. Co.* (1) by Lord Macnaghten, quoting the language of Lord Watson in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), that the theory of these mineral clauses was that they were for the benefit of both parties, on the one hand relieving the railway company from the necessity of immediate payment for all mines and minerals under land purchased by them, and on the other hand relieving the mine owner from the necessity of parting with his minerals before they were ready to be worked and before their real value could be ascertained. The effect of this legislation is to except from the conveyance to the company the minerals with either the full right of getting and working them, or such rights as the Act might give of getting and working them, if indeed there be any difference between the two. In considering, therefore, the

(1) [1907] A. C. 400.

(2) (1888) 13 App. Cas. 657, at p. 675.

question of the value of the minerals, it must be remembered that the question does not arise until the mine owner has arrived at the point of time when he is ready and desirous to work the minerals, and then there has to be ascertained the value to him at that point of time of the minerals which, if the company will not pay him their value, he may work according to the statute. The two appear to me to be correlative; you find the value to the mine owner by ascertaining what the minerals would be worth to him if he went on and worked them out. That view is, I think, in accordance with *Eden* v. *North Eastern Ry. Co.* (1), the difference in phraseology between the Railways Clauses Consolidation Act and this particular private Act being immaterial, having regard to the view taken by the House of Lords: they treated compensation under the Railways Clauses Consolidation Act as being the full value of the minerals after deducting the cost of getting, that is to say, hewing, severing, and bringing to bank.

That view is, of course, applicable to the present case, and there would be no difficulty about this point if the mineral concerned were coal, or some other mineral which has a market price, for in that case it would be simple enough to take the market price and deduct the cost of hewing, severing, and bringing to the pit's mouth. But here we are dealing with limestone, a very heavy material, practically not worth the cost of carriage for the purpose of finding a market, and a cement company has established its works at the edge of the quarry for the purpose of its convenient working; the limestone is, therefore, obviously of greater value to them than it could be to any one else. There is no possible market value which can be used as a guide to determine the value of the stone to this company, and the absence of market value has in effect been used as an argument on behalf of the railway company. The arbitrator has to ascertain the value to the mine owner as best he can, and I think it quite fair for him to do what he has done in the present case—not, of course, to take the whole profits made by the cement company out of the winning of the limestone, and also out of working it up into and selling it as cement, but

(1) [1907] A. C. 400.

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to consider the profits made by working it up into cement as a guide, and the only available guide, by which to ascertain the amount which it would have been worth the while of the cement company to give for the limestone for the purpose of so using it. For this purpose we must in effect treat the cement company as though it were divided into two companies working amicably together, for then we can disregard the difficulty arising from the fact of the mineral owner having only one market and take into consideration the fact that both the companies are working together with a view to doing what is fair and right between them, and we can ascertain, on the basis of the profits which the cement company could make, the price which it was worth their while to give for the limestone which they afterwards turn into a profitable article of commerce. I do not think that this award can be read as meaning that the arbitrator has given the whole of the profits made by the cement company as the value of the limestone to them, but I think that he rightly used those profits as the guide to the value, that is to the amount which it was worth the while of the cement company to give for the limestone. The only difficulty I have felt on this point has arisen from the various findings based on the various contentions in the award. Mr. Page contended that the proper view was that embodied in the railway company's first contention in paragraph 5; I do not agree with him. That contention is thus worded: "The value of the property if offered for sale on November 1, 1905, in the open market, the cement company being a possible competitor therefor." But that clearly means nothing approaching the view taken in *Eden* v. *North Eastern Ry. Co.* (1); it means rather something like this, that you bring the property into the market and offer it for sale, but there is no competition, because the only possible competitor is the company itself: this would be to my mind an altogether illusory method of ascertaining the value. The second contention is disposed of by the decision in *Eden* v. *North Eastern Ry. Co.* (1), because the present case was stated while the decision in that case of the Court of Appeal, which was in accordance with this contention, was under appeal to the House of Lords; the second contention

(1) [1907] A. C. 400.

was, therefore, properly put forward before the arbitrator so that the Court might deal with it in accordance with the ultimate view of the House of Lords. The third contention I have already dealt with, and I agree with the learned President that on that head 6074*l.* is the proper amount to be awarded.

The other point arises on the construction of s. 58. As I have already said, the theory of these mineral clauses is that the land-owner is paid for his land subject to the reservation of the mines and minerals, with such right of working as the Act gives him; if he has not the full right of working, he has been paid for it in the purchase-money. We must of course remember that we are dealing with a very early railway Act, relating to a line running through the Black Country, one of the most prolific mineral districts at that time, and no doubt the Act was to some extent pioneer and experimental; no similar sections appear in later Acts. By s. 54 the power of working is expressly made subject to "the restrictions hereinafter contained"; there is nothing of that sort in the public general Acts. Reading s. 55, I think we are bound to read it as referring also to the restrictions in s. 58, and as authorizing the owners to work and get the minerals lying under the railway without being liable for damage, provided that no shaft, pit, or quarry should be dug, sunk, or made, in or on the railway. The mine owners have therefore been paid for their land, with the reservation of a limited right of getting the minerals. There is no question, to my mind, having regard to the plans and sections, that the claimants are proposing to quarry in the railway; "on" is the surface, and "in" is underneath the surface. We are, I think, bound to hold that such a right has not been reserved to the land owner, and that the only reservation is of his right to work the limestone provided that he does not so deal with it as to be quarrying in the railway. I am therefore unable to agree with the judgment of Bray J. on either point, and think that both the appeal and the cross appeal should be allowed.

KENNEDY L.J. On the first point I am in entire agreement with the other members of this Court. We have to construe the finding of the arbitrator in the special case. The decision of Bray J. seems to be founded upon a supposition which I do not

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think correct as to reasons and methods by which that finding was arrived at by the arbitrator which it was not right for him to adopt. It is not disputed that in the finding words are used which are in accordance with the present state of the law as to what is a proper test of the value of the property, which is what the railway company have to pay. The judgment of Bray J. on this point seems to be based on an assumption that the arbitrator in getting at the figure of 6074*l.* must have taken into consideration something which, as I read the expressions he has used, he did not take into consideration. I have no right to assume that, because the arbitrator's figure is a very large one, he must have been simply assessing a sum based upon the profits that the cement company could have made, nor do I think it right to assume, as Bray J. does, that the claimants are basing their claim upon the profits made in their cement business, which the arbitrator finds has not been, and will not be, affected. I cannot find in the case any warrant for the suggestion that these profits have been so treated; so to treat them would be wrong in law. I think that the opinion of the learned judge was affected, not unnaturally perhaps, by the fact that the figure of 6074*l.* is ten times what he says is the market value of the limestone and ten times the actual loss of the claimants. I think that the arbitrator really has taken the profits as an element in ascertaining the sum which the company would give for the limestone—as an indication, not a measure, of value. There is no market for this limestone in the sense that there are large numbers of people ready to buy it, as they are to buy coal; and if the expressions "market value" and "open market" are to be understood as implying that the limestone were offered for purchase, the only competitor for it would be the company itself, on whose grounds and near whose works it happens to be. Bray J. has, I think, assumed that there is to be read into the arbitrator's finding a measure of value which I do not find to have been adopted in the case, and which would, I think, be wrong if it were; he has also, I think, been misled by the fact that "market value," when correctly used, merely refers to the value of some article, such as coal or corn, which has a market, and not to an article like limestone,

for which there is no doubt a use, but for which there is no market in the sense of there being a number of persons anxious to compete for it.

Upon the second point I regret that I am unable to concur in the judgments just delivered by my learned brothers, who have reversed the principle of the decision of Bray J. Of course I also differ from Bray J. in the result of his decision so far as regards amount, because he has placed the value of the second notice stone at 896*l.*, a value which necessarily follows from his judgment on the earlier part of the case, which I have just dealt with, while in my opinion the value should be the higher sum of 9180*l.* But the principle that the cement company are entitled to something in respect of the second notice stone seems to me to be right. The question depends entirely on the construction of the Act of 1833, and ss. 54, 55, and 58 cover the whole matter, and it is, I think, both unnecessary and possibly misleading to compare this statute with others; in my opinion its terms are plain. It gives by s. 55 to owners of property in the position of the claimants a right, subject to certain provisions, "to work and get such part of the said mines as lie under the said railway and other works, or within the distance aforesaid, without being liable to the said company for any damage that may be done thereby." It is contended that the working under s. 54 is to be subject to certain restrictions, which are to be found in s. 58, and the difference between my colleagues and Bray J. on the one hand and myself on the other is as to the construction of the last-named section, and also as to the fair meaning of the case stated by the arbitrator. The only finding of fact with which we are now concerned is that as to the second notice stone in paragraph 5, which says that "the claimants by entering upon their own property could and would have worked and gotten the said stone without going on to the surface of the railway." I cannot assume that the use of the word "on" in that finding does not cover and include the word "in," and if the point had been suggested to the arbitrator that the claimants, though not going "on to" the surface of the railway, might be working "in" it, I cannot doubt that he would have dealt with both words: he draws no distinction

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and, as I think, takes "on" as covering both; if he did not the case would, no doubt, have to go back to him, for, on the assumption that there is a material distinction between "on" and "in," we could not adjudicate upon a case in which a material finding was omitted. The arbitrator, then, has found that the stone could have been worked without going "on" to the surface of the railway, and proceeds to find that the effect of so working and getting it would have been to cause the subsidence of the rails and ballast of the railway; that is, he has in my view found that without interfering with the surface the claimants can work and get the limestone. Now the prohibition of s. 58 is against any shaft, pit, or quarry being dug, sunk, or made in or on the railway. That section affects the rights of the owner and should be strictly construed, and not construed to include that which may be in its result equivalent to what the section forbids. It may be that as much damage may be done by workings which are not "in or on" the railway in the sense that they necessitate the sinking of a shaft or pit or the making of a quarry in or on the surface of the railway, that is, the track and the artificial works which form part of it and are necessary for its support; but as s. 55 contemplates that damage may rightfully be done by working the minerals without giving rise to a claim by the railway company, I think the words must be read in their natural meaning of forbidding the actual sinking of a shaft or pit or making of a quarry in or on, meaning "in or on the surface," of the railway; and the arbitrator has found that without this being done the mines can be profitably worked. That is the view taken by Bray J., and it seems to me that he was right. The reason for the use in the section of the word "in," which appears to have been treated before the arbitrator as immaterial, may be that it might otherwise have been contended that the word "on" was confined to the actual track of the railway, which in practice would be absurd. If a pit is sunk into the ballast, it is an interference, as it seems to me, both in and on the railway. Further, there are, if I understand the facts, only, I think, two points at which it is even suggested that the outcrop of the limestone immediately under the railway is such that to work the stone would be practically equivalent to sinking a pit or mine or

making a quarry in the railway. Why should the claimants be deprived of the right of at any rate working the remainder? On that point I should think that in either view the case ought to be sent back to the arbitrator to ask whether he draws any distinction between the points where there is an outcrop of limestone at the surface of the line and the remainder of this property; otherwise, the claimants are getting no compensation for being deprived of the right of working the whole of the second notice stone, although it is only in isolated spots that the working would be practically equivalent to working "in or on" the line. For these reasons I am of opinion that the construction placed upon s. 58 by Bray J. was right, though of course I think, in accordance with our unanimous decision on the first point, that the figures ought to be increased to 9180*l.*

Appeal and cross appeal allowed.

Solicitors for claimants: *Whitfield & Harrison.*
Solicitor for railway company: *C. de J. Andrewes.*

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[IN THE COURT OF APPEAL.]

BAXTER'S LEATHER COMPANY *v.* ROYAL MAIL STEAM PACKET COMPANY.

Ship—Bill of Lading—Limitation of Shipowner's Liability—Loss due to Shipowner's Negligence.

The plaintiffs shipped two packages of leather goods on board the defendants' ship for carriage from London to Buenos Ayres under a bill of lading containing a clause which specified a large number of excepted perils for which the defendants were not to be responsible, whether the peril, or the loss or damage arising therefrom, was caused by the negligence of the defendants' servants or agents or not, and a further clause by which the defendants were not to be accountable at all for bullion or other specified valuable or fragile articles "nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package" unless shipped under a special declaration of value and extra freight paid. The plaintiffs' goods were not delivered at Buenos Ayres, and their loss was found as a fact to have been due to the negligence of the defendants' servants; they had not been shipped under a special declaration of value, nor had extra freight been paid upon them:—

Held that, notwithstanding that the loss was due to the negligence of the defendants, they were only liable to the limited extent provided by the bill of lading.

Decision of Bigham J., [1908] 1 K. B. 796, affirmed.

Appeal of the plaintiffs from the judgment of Bigham J., reported [1908] 1 K. B. 796.

The plaintiffs' claim was for 98*l.* 19*s.* 8*d.*, the value of two cases of dressed leather which were delivered by them to the defendants, and accepted by the defendants, for carriage in the defendants' ship from London to Buenos Ayres upon the terms of a bill of lading given by the defendants to the plaintiffs. On arrival of the ship at Buenos Ayres the cases could not be found, and the cause of their disappearance had never been ascertained. The plaintiffs alleged that they had been lost through the defendants' negligence, and this was found as a fact to have been the case.

The material clauses of the bill of lading were as follows:—

"1. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from any of the following perils, causes, or things,

namely:—The act of God, the King's enemies, pirates, robbers, thieves by land or sea, vermin, barratry of master and mariners, capture, seizure, or embargo, adverse claims, restraints of princes and rulers or people, strikes, lock-outs, labour disturbances, trade disputes, whether partial or general, or anything done in furtherance thereof, whether the owners be parties thereto or not, the action of mobs, effects of climate, heat of holds, steam, smoke, sweating, insufficiency of packages in size, strength, or otherwise, bursting of packages or consequences arising therefrom, leakage, breakage, pilferage, chafage, wastage, rain, spray, rust, oil, frost, thaw, floods, decay, hook marks or injury from hooks, stowage, or contact with or smell or evaporation from any other goods, or damage from coal or coal dust, leakage or flow of or contact with urine, manure water, drainage of any animals carried in the said ship, or from their stalls, inaccuracies in, obliteration, insufficiency, or absence of marks, numbers, or addresses, or description of goods shipped, difference between the marks or the contents of the packages and the description thereof in this bill of lading (the alleged marks, numbers, or description in margin notwithstanding), injury to or soiling of wrappers, or packages, loss of weight, detention, delay, lighterage to or from the vessel, transhipment, landing, jettison, explosion, heat, fire, on board or on shore, at any time or in any place, nor for incorrect delivery, perils or accidents of the seas, rivers, and navigation, pumps or pipes of any kind (including consequence of defect therein or damage thereto), collision, stranding, heeling over, upsetting, submerging, or sinking of ship in harbour, river, or at sea, admission of water into the vessel by any cause, and whether for the purpose of extinguishing fire or for any other purpose, unseaworthiness of the ship at or after the commencement of the voyage (provided all reasonable means have been taken by the shipowners or their agents to provide against such unseaworthiness); whether any of the perils, causes, or things above mentioned, or the loss, damage, or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether in relation

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to the navigation, management, or stowage of any carrying vessel, or otherwise, and whether on board the said ship or any other ship belonging to, or chartered by, them, for whose acts they would otherwise be liable, or otherwise howsoever."

"7. That the master, owners, or agents of the vessel or its connections shall not be accountable to any extent for bullion, specie, precious metals, manufactured or unmanufactured, plated articles, glass, articles contained in glass, articles of a fragile or perishable nature, china, crockery, earthenware, jewelry, articles used for jewelry, precious stones, trinkets, watches, clocks, timepieces, mosaics, bills, bank notes of any country, orders, notes, or security for payment of money, stamps, maps, letters, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, laces, or cashmere, manufactured or unmanufactured, made up into clothes, or contained in any package or parcel, whatever may be the value of such articles, nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package, or relatively for any proportion thereof, nor in any case for any amount beyond the invoice price of the goods, unless shipment be made upon a special order containing a declaration of the value and the bills of lading are signed in accordance therewith, and extra freight as may be agreed upon be paid."

It was admitted that the shipment of the plaintiffs' goods had not been made under a special order containing a declaration of their value, and that no extra freight had been paid in respect of them. The defendants relied upon clause 7 of the bill of lading, and contended that they were only liable to the amount of 16*l.* 10*s.*, being at the rate of 2*l.* per cubic foot for the two cases, which sum they paid into Court. The defendants called no witnesses at the trial.

The learned judge gave judgment for the defendants on the ground that, although the loss was occasioned by their negligence, they were only liable to the limited extent provided by clause 7 of the bill of lading. The plaintiffs appealed.

J. A. Hamilton, K.C., and *F. D. Mackinnon*, for the plaintiffs. The judge has found as a fact that the loss of the plaintiffs'

goods was due to the negligence of the defendants, and under these circumstances the defendants cannot limit the amount of their liability by taking advantage of the provisions of clause 7 of the bill of lading. The defendants, although not common carriers, have, by accepting the goods for carriage, come under the same liability as common carriers in respect of them, unless that liability is modified or limited by the special terms of the contract of carriage. No doubt the defendants have contracted themselves out of liability in respect of the excepted perils set out in clause 1 of the bill of lading; but that clause does not enumerate all possible perils, nor does it specifically mention negligence as one of the perils; its language is too general to protect the defendants from liability for loss caused by negligence: *Phillips* v. *Clark* (1); *Price & Co.* v. *Union Lighterage Co.* (2) The question turns, therefore, upon clause 7, which would be useless if it did not mean that the shipowners still remained liable for some causes of loss; being a clause of limitation of the shipowners' ordinary liability, it must be read as being subject to the qualification that the shipowners are to exercise due care in the carriage of the goods: *Tattersall* v. *National Steamship Co.* (3) *Morris* v. *Oceanic Steam Navigation Co.* (4), where a clause of limitation of liability was held to apply where the shipowner had failed to use due diligence to make the ship seaworthy, is distinguishable, for in that case the liability was excluded in plain and express language. There being no express exception in the bill of lading of liability for the consequences of negligence, the defendants cannot take advantage of clause 7 to limit the quantum of their liability. [They also cited *Smith* v. *Horne* (5); *Beck* v. *Evans* (6); *Peek* v. *North Staffordshire Ry. Co.* (7); *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown.* (8)]

Scrutton, K.C., and *D. Stephens*, for the defendants, were not called upon to argue.

SIR GORELL BARNES, PRESIDENT. The plaintiffs were the shippers in London of two cases of dressed leather to be carried

(1) (1857) 2 C. B. (N.S.) 156.
(2) [1904] 1 K. B. 412.
(3) (1884) 12 Q. B. D. 297.
(4) (1900) 16 Times L. R. 533.
(5) (1818) 2 Moo. C. P. 18.
(6) (1812) 16 East, 244.
(7) (1863) 10 H. L. C. 473.
(8) (1883) 8 App. Cas. 703.

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on board the defendants' ship from London to Buenos Ayres upon the terms of a bill of lading. Upon the arrival of the ship at Buenos Ayres the cases were not forthcoming, and there was no evidence to shew what had happened to them. The plaintiffs are suing for damages for their non-delivery, and claim the value of the goods as such damages. Bigham J. came to the conclusion that in these circumstances the fact of non-delivery was consistent with an absence of negligence on the part of the defendants; but he held that upon the authorities the non-delivery clearly raised a prima facie presumption of negligence on the part of the shipowners, and, therefore, in the absence of evidence to rebut that presumption, he found as a fact that the loss of the plaintiffs' goods was due to the defendants' negligence. Neither party quarrels with that part of the judgment, and the case has been argued upon the assumption that the non-delivery was owing to the negligence of the shipowners. It is unnecessary to inquire whether that view is right, because, having regard to the terms of the bill of lading, I am of opinion that even upon that assumption the shipowners are not liable.

Our decision must turn entirely upon the construction of this bill of lading; no question of principle is involved, nor can we derive much assistance from decisions as to the construction of other bills of lading. The legal position of the parties, that is, of shipowners to shippers of goods, apart, of course, from the provisions of the particular bill of lading, has been established ever since the principles of mercantile law became to any extent fixed. Shipowners are not, strictly speaking, common carriers, but they are under the same kind of liability as common carriers unless that liability is cut down by a special contract; in other words, by the insertion of excepted perils in the bill of lading that liability has been cut down to an ever-increasing extent until it now requires great ingenuity to discover in a bill of lading any matter in respect of which the shipowners' liability is not excluded. In the present case clause 1 of the bill of lading excludes liability for loss in so many cases that it is difficult to suggest an exception to it. That is the general position, and it is further established by a long series of decisions that if a shipowner wishes to exclude liability for negligence

he must do so in clear and express terms. If the shipowner enumerates a number of perils, and if any of them are brought about by his negligence, he remains liable unless he has excluded negligence in relation to them in express words. This bill of lading excludes negligence in relation to all the perils mentioned in every possible way.

In construing this bill of lading, its language must receive a natural and reasonable construction, it being borne in mind that, as the obligation is originally on the shipowner and has to be cut down by the provisions of the bill of lading, those provisions must be strictly construed, and in cases of doubt must be construed adversely to the shipowner. Clause 1 specifies a very large number of perils for which the shipowners are not to be responsible, whether the loss or damage is caused by negligence or not. Then comes clause 7, which deals with two different classes of goods; first, with small and valuable articles, as to which the shipowners undertake no liability at all, and, secondly, with all other goods of whatever description, as to which they will not be accountable "beyond the amount of 2*l.* per cubic foot for any one package, or relatively for any proportion thereof, nor in any case for any amount beyond the invoice price of the goods, unless shipment be made upon a special order containing a declaration of the value and the bills of lading are signed in accordance therewith, and extra freight as may be agreed upon be paid." In construing clause 7 it is important to have regard to the provisions enabling the shipper to declare the value of the goods at the time of shipment and to have a bill of lading in accordance therewith upon payment of extra freight; where the shipper avails himself of that alternative the shipowner would get an additional consideration for accepting a larger liability than would be his under ordinary circumstances, and presumably he would take greater care in the carriage of the goods. The argument for the defendants appears in a very concise form in the report of the case before Bigham J. (1), where Mr. Scrutton says: "It is true that a shipowner, in the absence of a special contract, incurs the same liability as a common carrier; but a shipowner is not a common

(1) [1908] 1 K. B. 796, at p. 798.

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carrier, and the contract of carriage must be construed without reference to the common law liability of a common carrier. Clause 7 of the bill of lading entirely exempts the defendants from liability in the case of certain goods, and limits the amount of their liability 'for any other goods of whatever description.' The intention is to limit the defendants' liability in all cases in which they are liable, and one thing for which they are liable is negligence." To my mind that is a sound argument, and I adopt it as expressing my view of the nature of this contract. It amounts to this: under clause 1 the shipowners had excluded liability for specified perils, comprising nearly all the cases that could arise; this still, however, left them liable in some cases; so they went on to say in clause 7 that for certain fragile and valuable articles they would not be responsible at all, and for other goods would only be liable to a limited amount, unless in either case the shippers made a special bargain by declaring the value of the goods and paying extra freight. That is my view of the bill of lading. The question is purely one of construction, and bearing in mind the principle that we must, where there is any doubt, construe the bill of lading in the sense most adverse to the shipowner, I am satisfied that we are giving to it the only reasonable effect. I may add that nothing which I have said is to be taken as affecting the obligation of shipowners to provide a seaworthy ship. The appeal must be dismissed.

FARWELL L.J. I am of the same opinion. The question turns entirely on the construction of this bill of lading, the only unusual circumstance being the peculiarity of the law, if it may properly be described as peculiar, relating to carriage by sea. In *Steinman & Co.* v. *Angier Line* (1) Bowen L.J. said, "Words of general exemption from liability are only intended, unless the words are clear, to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants"; and he was there, I think, dealing solely with the duty of the shipowner to carry safely, and not with his duty to provide a seaworthy ship. I therefore read clause 1 of this bill of lading thus: I read into it the provision imported by law that

(1) [1891] 1 Q. B. 619, at p. 623.

the master and owners shall not be responsible for loss, &c., unless it has arisen from the misconduct or default of the master or his servants, and having done so, I find that nearly everything that can be thought of is included amongst the excepted perils. It has in fact taken expert counsel some two days to suggest a very few additional risks not included in the excepted perils, and I think it not unreasonable to regard the parties as having contracted on the footing that all these perils were excepted subject to the proviso that the exemptions should not extend to negligence. Then I deal with the bill of lading as a whole, and the first observation is that clause 7 assumes the existence of the shipowners' liability, while clause 1 has already excluded liability except in case of negligence; it follows that clause 7 can only have application to cases of negligence. I therefore read the two clauses together, and the combined effect of clause 1 with the earlier portion of clause 7 is that the shipowners will not be responsible for loss, &c., unless it arises from negligence, provided that they will not be accountable or responsible at all for bullion and other specified articles of value in a small compass or for certain fragile articles; then in the case of any other goods of whatever description than those specified articles they will only be liable in case of negligence under the latter part of clause 7 to the extent of 2*l.* per cubic foot for any one package. In either case the shipowners' liability will remain if the shipper declares the value of the goods and pays the extra freight or insurance. That seems to be a perfectly rational contract and to make clause 1 and clause 7 consistent with each other. I agree, therefore, that this appeal should be dismissed.

KENNEDY L.J. I entirely agree with the judgment of Bigham J. Clause 1, which is not an uncommon form of clause, protects the shipowner generally, without reference to the character of the goods, against all mischief there specified even if caused by negligence on the part of persons employed by the shipowner or his agents. Clause 7, which we have to construe, deals with two things: first, with goods of special value and often of small bulk, and therefore the more easily lost; as to these the shipowners disclaim all liability whatever; secondly, with other

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goods not specially named, of whatever description they may be, for which the shipowners will not be liable beyond a limited amount, unless the shipment is made upon a special order containing a declaration of value and bills of lading are signed in accordance therewith and extra freight paid. Construing that clause in the natural sense of the language used, and bearing in mind previous decisions on the subject which shew that clauses of exception in a bill of lading are to be construed as favourably to the shipper as they can reasonably be construed, the only rational meaning which I can put upon it is that for certain specified articles the shipowners will not be liable to any extent, which means that they will not be liable at all, and that the enforcement of a claim on the ground of negligence in respect of them is barred, while for other articles, whatever be the cause of loss, they limit the amount of their liability. Why should they limit their liability in respect of these articles if, as the plaintiffs contend, they are to be liable for their full value when there is negligence occasioning their loss? A construction involving such an unnatural arrangement should not be lightly adopted. The receipt of goods at the port of shipment, as evidenced by the signing of the bill of lading, coupled with their non-delivery at the port of destination, affords a prima facie presumption of negligence in their carriage, as is pointed out by Bigham J. That is the very kind of case which it is difficult for the shipowner to meet by proof of a cause of loss which is within the special exceptions of his bill of lading. Without impinging in the slightest degree upon the settled principle that it lies upon the shipowner to shew that he has stipulated in plain terms for the protection which he invokes, it is clear to me that the object of clause 7 was to exclude altogether the shipowner's liability in respect of certain classes of goods and to limit the amount of his liability in respect of others, whether the loss be due to the negligence of his servants or not.

Appeal dismissed.

Solicitors for plaintiffs: *Ballantyne, McNair & Clifford.*
Solicitors for defendants: *Holman, Birdwood & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1908
May 26.

THE KING *v.* THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Poor Rate—Appeal—Notice of Appeal—Notice to Assessment Committee—Entry and Respite of Appeal—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act*, 1864 (27 *& 28 Vict. c.* 39), *s.* 1.

By s. 1 of the Union Assessment Committee Amendment Act, 1864, "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union . . . ":—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting) that, where written notice of appeal against a poor rate had been given to an assessment committee less than twenty-one days before the first practicable quarter sessions after the decision appealed against, the appellants were nevertheless entitled to have the appeal entered and its hearing respited to the next sessions.

Appeal from the decision of a Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) making absolute a rule nisi for a mandamus to the justices of the West Riding of Yorkshire commanding them to enter or cause to be entered continuances from session to session to the next general quarter sessions for the West Riding, and to enter and respite an appeal by the Denaby and Cadeby Main Colliery Company, Limited, the applicants, against a poor rate for the parish of Denaby, made on May 4, 1907. The facts were in substance as follows:—

The applicants were the occupiers of two collieries or pits situate in the parishes of Denaby, Cadeby, Conisborough, Mexborough, and High Melton, in the Doncaster Union. (1) In March, 1907, the overseers prepared a supplemental valuation list, which included the pits of the applicants, and signed and deposited it in the ordinary way. In April the supplemental

(1) There were separate rules, all raising the same point, in respect of each of the five parishes.

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valuation list was transmitted to the assessment committee, by whom it was duly confirmed. A rate was shortly afterwards made upon the basis of the supplemental valuation list, and on June 4 the applicants gave notice to the necessary parties, including the assessment committee of the Doncaster Union, of their objection to the assessments and the valuation list and also to the rates made upon them. On July 6 the objection was heard by the assessment committee, who confirmed the valuation list without alteration. The next quarter sessions to which an appeal from the decision of the assessment committee could be brought was October 14, and on September 28 the applicants informed the assessment committee of their intention to enter an appeal; on October 3 they gave by post formal notice of appeal to the assessment committee and to the overseers. The notice so given was less than the twenty-one days' notice required by s. 1 of the Union Assessment Committee Amendment Act, 1864, to be given to an assessment committee. On October 14 the applicants appeared at quarter sessions, and applied to enter and respite the appeal, claiming to be entitled as of right to have it entered and respited. The quarter sessions held that the notices of appeal were out of time, and dismissed the appeal, being of opinion that proper notices could only be given for the then next quarter sessions, which would not be the next practicable quarter sessions after the decision of the assessment committee to which an appeal could be brought, and at which they would therefore have no jurisdiction to hear the appeal. The present rule was thereupon obtained on behalf of the applicants, and was made absolute by the Divisional Court. The assessment committee and the overseers appealed. (1)

(1) By the Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 4, persons aggrieved by any rate or assessment made for the relief of the poor, giving reasonable notice to the churchwardens or overseers, may appeal to the next general or quarter sessions of the peace; but if it appears to the justices that reasonable notice was not given, they are to adjourn the appeal to the next quarter sessions, and then and there finally hear and determine it.

By the Poor Rate Act, 1801 (41 Geo. 3, c. 23), s. 4, the above notice must be in writing and must specify the grounds of appeal, and by s. 6 notice must be given not only to the churchwardens and overseers, but also to other persons interested.

By the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 1, "In every

Macmorran, K.C., and *E. Shortt*, for the appellants. The quarter sessions were right in refusing to enter and respite the appeal, for the proper notice to the assessment committee provided for by s. 1 of the Union Assessment Committee Amendment Act, 1864, had not been given. It is admitted that under s. 4 of the Poor Relief Act, 1743, there was a right to have the appeal entered and respited to the next sessions in cases where a reasonable notice of appeal had not been given by the appellants to the overseers before the quarter sessions. Then came s. 6 of the Poor Rate Act, 1801, under which reasonable notice in writing of the appeal had to be given in writing not only to the churchwardens and overseers, but also to other persons interested, while the Quarter Sessions Act, 1849, by providing for fourteen clear days' notice to be given of every appeal to quarter sessions, laid down a statutory definition of the "reasonable notice" required by the Act of 1743. Apart from subsequent legislation the respondents would have been entitled to come to quarter sessions and have their appeal entered and respited, although no notice of appeal had been given. But the Union Assessment Committee Amendment Act, 1864, provided for a twenty-one days' notice of appeal to be given to the assessment committee, a then recently-constituted body, which, under s. 2 of that Act, had the right to appear, with the consent of the guardians, as respondents to the appeal; the twenty-one days' notice is therefore of importance to them as giving them time to obtain the guardians' consent. The assessment committee are not in the same position as the overseers under the old law, and the giving of the twenty-one days' notice to them is a condition precedent to the entering of any appeal. The notice must be

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case of appeal . . . . to any court of general or quarter sessions of the peace fourteen clear days' notice of appeal at least shall be given . . . ."

By the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1, "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union . . . . ."

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given, not twenty-one days before the hearing of the appeal, but twenty-one days before the date of the sessions to which the appeal is to be made, that is, the first practicable sessions after the decision appealed against. [They cited *Reg.* v. *Eyre* (1); *Reg.* v. *Surrey Justices.* (2)]

Ryde (*Jeeves* with him), for the respondents. Under s. 1 of the Act of 1864 the respondents had an absolute right to have their appeal entered and respited to the next sessions and then heard. In construing that section previous legislation must be borne in mind. Upon the statutes of 1743, 1801, and 1849 it had been decided in the clearest terms that under the Act of 1743 a person giving no notice of appeal at all was within the section, and was entitled to have his appeal entered and respited to the next sessions; that an appellant might even take advantage of his own wrong in not giving notice; and that, where the appellant failed to give the statutory notice to third parties interested, the justices were nevertheless required by the Act of 1743 to enter his appeal and respite it to the next sessions. In *Reg.* v. *Eyre* (1), which was a case of failure to give notice of appeal to a third party, the Court held that the Acts of 1743 and 1801 must be read together; similarly, in the present case the respondents contend that the Act of 1864 should be read with earlier Acts. It cannot be supposed that Parliament intended to preserve the existing procedure with regard to notice to the overseers and to impose wholly inconsistent procedure as to notice to the assessment committee. The provision as to "twenty-one days'" notice to the assessment committee means only twenty-one days before the actual hearing of the appeal, and not twenty-one days before the next sessions after the decision appealed against. [They also cited *Rex* v. *Buckinghamshire Justices* (3); *Rex* v. *Staffordshire Justices* (4); *Reg.* v. *London Justices.* (5)]

Shortt, in reply, referred to *Imperial and Grand Hotels Co.* v. *Christchurch Guardians.* (6)

(1) (1856) 6 E. & B. 992.
(2) (1880) 6 Q. B. D. 100.
(3) (1803) 3 East, 342.
(4) (1806) 7 East, 549. The correct citation of this case seems to be *Reg. v. Shropshire Justices.* See 10 East, 407.
(5) (1846) 9 Q. B. 41.
(6) [1905] 2 K. B. 239.

SIR GORELL BARNES, PRESIDENT. The question on the present appeal is one of some difficulty, owing to the somewhat inconsistent provisions of three or four Acts of Parliament, but I have come to the conclusion that the decision of the Divisional Court was right and ought to be affirmed. In order to appreciate the point I must shortly recapitulate the facts. The appeal is from a judgment of the Divisional Court making absolute a rule nisi for a mandamus to quarter sessions, who had refused to enter and respite an appeal against a poor rate and against the assessment and valuation of certain collieries for the purposes of that rate. These collieries were valued shortly after December 31, 1906; in March, 1907, the valuation was completed, and a supplemental valuation list, in which they were included, was made in March, 1907, and deposited on March 9; on April 13 the valuation list was confirmed by the assessment committee, and in April and May rates were made upon the basis of that list. On June 4 notice of objection to the valuation list was given by the colliery company, and on July 6 the appeal was heard by the assessment committee, who confirmed the assessment. The next practicable quarter sessions after that date was on October 14, but the company failed to give notice of appeal to the assessment committee within the time prescribed by the Act; they gave notice on October 3 both to the overseers and to the assessment committee, which was obviously less than the fourteen and twenty-one days' notices respectively required by statute. At quarter sessions the overseers objected to the hearing of the appeal on the ground that the proper notice had not been given to the assessment committee, and the quarter sessions, considering that they had no jurisdiction, refused to enter and respite the appeal. A rule to compel them to do so was thereupon obtained, and was made absolute by the Divisional Court; hence this appeal.

Substantially the question turns on some short provisions of three Acts of Parliament, and upon the law and practice as to appeals to quarter sessions. The first statute is the Poor Relief Act, 1743, which provided that it should be lawful for any person aggrieved by a poor rate or assessment, on giving reasonable notice to the churchwardens or overseers, to appeal to the next general

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The President.

or quarter sessions; with the important proviso, however, that if it appears to the justices that reasonable notice was not given they shall adjourn the appeal to the next quarter sessions, and then and there finally hear and determine it. The right to appeal to the next sessions was therefore qualified by the necessity for giving reasonable notice to the churchwardens and overseers. By the Poor Rate Act, 1801, notice was to be given not only to the churchwardens and overseers, but also to any other persons interested, but there is no mention of the length of the notice to be given. The Quarter Sessions Act, 1849, s. 1, makes fourteen clear days' notice necessary in all appeals to any Court of general or quarter sessions; the effect of this provision, so far as it relates to the present case, is to convert the "reasonable notice" of the Act of 1743 into a fourteen days' notice. The last Act to which I need refer is the Union Assessment Committee Amendment Act, 1864, which by s. 1 provides that an appellant against a poor rate must give to the assessment committee twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of his intention to appeal. The point is taken in the present case that the Act of 1864 requires twenty-one days' notice of appeal to be given to the assessment committee before the sessions at which the appeal would come on in the first instance. The answer to it is that, reading all the Acts together, the twenty-one days' notice is a notice to be given before the appeal is in fact heard, and that it may be given although the appeal has been respited from a previous sessions.

There are two or three decisions which throw some light on the question. The first case is *Reg.* v. *Surrey Justices* (1), in which the judgment was given by Manisty J. and concurred in by Bowen J.; it expresses the view contended for in the present case by Mr. Ryde, that under the earlier Acts a person who fails to give the statutory notice is still able to obtain a respite of his appeal to the following sessions. And it had already been held in *Rex* v. *Staffordshire Justices* (2) that, although the appellant had had ample time to give the notice, the hearing of the appeal might nevertheless be respited. I need only refer to

(1) 6 Q. B. D. 100.

(2) 7 East, 549.

one more case, that of *Reg.* v. *Eyre* (1), in which the leading judgment was delivered by Lord Campbell C.J.; it was a case in which the notice of appeal had not been given to third parties interested in the matter. A perusal of the judgment shews that the ground of decision was that the Court considered that the two Acts which I have mentioned should be read together, and the respondents in the present case ask that the same two Acts shall be read together with the Act of 1864. When the wording of the last-named Act is looked at, it is doubtless somewhat difficult to construe; but I am prepared to adopt the view of the Divisional Court, which is clearly indicated by Ridley J. when he says: "It would be going too far, I think, to say that they must be given twenty-one days' notice, not before the hearing of the appeal, but before it is begun at all. It may be entered and respited without being actually heard. I think the hearing is the thing that is intended to be dealt with by the first section of that Act." That is the view which I take, and in my opinion it is supported by the language of s. 1 of the Act of 1864 when read as a whole. That language seems capable of two alternative meanings—first, that, prior to the appeal being heard, the notice of appeal must be given twenty-one days before the first sessions at which it can come on for hearing; and, secondly, that the notice of appeal must be given twenty-one days before the sessions at which the appeal is in fact heard. The latter is the view taken by the Divisional Court, and in my opinion it is right. The language of the proviso, which is of a different character to that in the first part of the section, fortifies this view. The Acts must be read together. If it had been intended that the right of appeal was to be defeated because the twenty-one days' notice had not been given, I cannot imagine that the Legislature would not have used far stronger and clearer language to effect their purpose. No doubt the case involves a difficult point of construction, but I think the view indicated by the Divisional Court is sound and reasonable.

FLETCHER MOULTON L.J. I regret that I am unable to come to the same conclusion as my learned brethren; it is, however,

(1) 6 E. & B. 992.

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of little importance what construction is placed upon the section in question, provided a rule of practice is authoritatively laid down.

We start with the Act of 1743, which gave persons objecting to a rate a right of appeal to quarter sessions, provided they gave the churchwardens and overseers reasonable notice of the appeal. The Legislature then proceeded to deal with the case where reasonable notice had not been given, and took the somewhat dangerous course of not making reasonable notice of appeal a condition precedent to the right of appeal, but left a locus pœnitentiæ to a negligent appellant by saying that, if reasonable notice had not been given, the sessions might adjourn the hearing to the next sessions. It left it, however, perfectly clear that the only sessions to which an appeal could be brought was the next sessions after the making of the rate, which was interpreted by the Courts as being the next practicable sessions. I do not agree that this practice granted any additional right to the defaulting appellant or that it entitled him to make his appeal at the next sessions but one if he preferred so to do: on the contrary, I think it was in favour of the churchwardens and overseers; they could claim that the appeal should be postponed if the notice was unreasonably short, but if they elected not to object I cannot see that the appellant had a right ex debito justitiæ to have the hearing adjourned. It was in my opinion a provision for their protection and could be waived by them. By the Poor Rate Act, 1801, notice of appeal must also be given to all persons interested; this provision has been construed by the Courts as putting persons interested in the same position as churchwardens and overseers are in under the Act of 1743, and there is much in the Act itself to justify these decisions; at any rate, they have been acted upon for so long a time that it is not desirable to cast a doubt upon their accuracy. I take it, therefore, that the persons interested in opposing an appeal are entitled to the same notice with the same incidents as churchwardens and overseers. The right, therefore, of an appellant is to have his appeal respited rather than that it should be dismissed, but this is not as an alternative to its being heard then and there if the opponents consent.

The Act of 1849 merely got rid of the requirement of a "reasonable" notice, for which it substituted a fourteen days' notice at least; it adds no new complication to the question.

Later on the Legislature provided for the formation of assessment committees, who were entrusted with very important duties; and by the Act of 1864 the Legislature regulated their rights with regard to appeals against poor rates. A special notice was directed by that Act to be given to the assessment committee by persons appealing to quarter sessions against a poor rate, and it is on s. 1 of the Act of 1864 that the whole question turns. What was the position of things at that date? The Act of 1743 had long been in force and was acted upon every day; it must have been prominently before the minds of those dealing with the poor law and with appeals against assessments, and we are therefore justified in believing that its provisions were in the contemplation of the Legislature when they passed the Act of 1864. The language of s. 1 of that Act is peculiar. The Act of 1743 had drawn a sharp line between the sessions to which the appeal was made, (which must be the first practicable sessions after the making of the rate), and the sessions by which the appeal was in fact heard, which might be the first sessions after the making of the rate, or might, by reason of the exercise of the power of respite, be the sessions after that; this distinction must have been present to the minds of the Legislature when passing further legislation. They thought that before the appeal was heard something must be done in the way of giving notice to the assessment committee; and they provided that the notice was to be given—not twenty-one days previous to the actual hearing—but twenty-one days previous to the sessions to which the appeal was to be made. I am of opinion that the Legislature must have been fully aware of the distinction between the two, and must have meant what they said when they provided that the twenty-one days' notice was to be given previous to the sessions to which the appeal was to be made. In other words, I hold that the section has a distinct reference to the Act of 1743; and I consider that its language further supports my view, because it provides that the notice is to be one of "intention" to appeal. This phrase implies that the

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notice is to be given twenty-one days before the sessions at which the appeal is made: it cannot in my opinion mean twenty-one days before the actual hearing. No one gives notice of his "intention" of bringing an action after the action has been brought, and the trial has been adjourned. This language all shews that the date of the special sessions which is empowered to receive the appeal is that which is referred to, and this is beyond all doubt the first sessions after the making of the rate. To no other sessions can the appeal be brought; it must be to the first sessions, whether the hearing of the appeal is to be at that sessions or not. I am of opinion, therefore, that the notice to the assessment committee must be given twenty-one days before the first practicable sessions after the making of the rate appealed against, and that it must state the intention of the party to appeal. In my opinion a wrong conclusion has been drawn from the language of Collins M.R. in *Imperial and Grand Hotels Co.* v. *Christchurch Guardians* (1); he clearly considers that the fact that twenty-one days' notice is to be given before the appeal is made is to be taken into account when considering which is the first practicable sessions to which the appeal can be brought. This directly supports the view that I have enunciated, because if the other view is correct, the twenty-one days ought not to be counted at all, inasmuch as a respite must take place, and therefore there will be plenty of time to give the notice. No difficulty arises from the fact that the Courts have decided that the Acts of 1743 and 1801 ought to be read together. Their language clearly points to this. But the Act of 1864 is couched in totally different language; it does not put the assessment committee in the same position as the persons dealt with in the Act of 1743. It is not a case of legislation by reference, but a case where the legislation is such that the rights of an assessment committee may be ascertained from the Act itself; the Act of 1864 must therefore, in my opinion, be looked at by itself. The latter portion of the section deals with a condition precedent of a totally different character and has no bearing on the question before us. I think that this appeal ought to be allowed.

(1) [1905] 2 K. B. 239.

FARWELL L.J. I agree with the judgments of the President and the Divisional Court. The Act of 1864 must be regarded as an Act intended to apply a new state of circumstances to well-established matters. Prior to that Act a rated person was in the position of being able to appeal to quarter sessions on giving a reasonable notice of his intention to appeal, and it is plain that this notice was to be given for the next sessions after the making of the rate. It seems to me that there must be a slip in the judgment of Collins M.R. in *Imperial and Grand Hotels Co.* v. *Christchurch Guardians* (1) when he suggests that if the next quarter sessions are too soon after the publication of the rate to allow of the proper statutory notice, the appeal is not to the next, but to the next practicable, quarter sessions, meaning thereby the quarter sessions that follows the next sessions. The authorities are uniform in shewing that the notice of appeal must be given for the quarter sessions immediately following the making of the rate, and if reasonable notice has not been given, the appeal is automatically respited to the next sessions, which must hear and determine it. I agree with the President that the Acts of 1743, 1801, and 1849 must be read together. When, therefore, the Act of 1864 was passed a person dissatisfied with the rate had a right to appeal and to have his appeal respited though he had given no notice of appeal. I cannot see how the overseers could give jurisdiction to the justices. When once the Act of 1849 is read in there is a clear direction that, if fourteen days' notice is not given, the justices *shall* adjourn the hearing. It is impossible to escape the stringency of this legislation. And it must be remembered that the overseers are the trustees for all the ratepayers, and they cannot escape the operation of the words which say that the justices shall adjourn the sessions.

This right of appeal, which existed in 1864, was not taken away by the Act of that year; it does not purport to do so, but simply adds a provision that, whereas the assessment committee has been added to the list of bodies interested in rating, a notice of appeal must be given to it, and that it may appear upon the hearing of the appeal. Prima facie it seems unnatural

(1) [1905] 2 K. B. 239.

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to suppose that this notice is a condition precedent which overrides the right of appeal. It is plain that if notice is given to the assessment committee (not under the Acts of 1743 and 1801) there is a right to have the appeal respited. It cannot be, in the converse case, that there is no appeal and no right to respite. The right to respite arises because notice has not been given to the overseers fourteen days before the sessions, and that right has never been taken away. Then s. 1 of the Act of 1864 is introduced by the words "Before any appeal shall be heard," notice shall be given, &c.

The result in such a case is that the appeal is heard at the second quarter sessions after the making of the rate. The appellant has given a notice of appeal which he is entitled to give, and under the Acts of 1743 and 1801 the hearing of the appeal is respited to the next sessions, and then notice must be given to other parties of the appellant's intention that the appeal will be heard at the next sessions. This seems to me the only way of interpreting the sections without abrogating the right of appeal. There is much in the point that the phraseology of the Act of 1864 is different from that of the prior Acts. In my opinion the point whether both the conditions superimposed by s. 1 of the Act of 1864 were conditions precedent was not necessary to the judgment of Collins M.R. in *Imperial and Grand Hotels Co.* v. *Christchurch Guardians* (1), for it seems to me evident that the conditions are diverse in their nature, and that while one of them is a condition precedent the other is not. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Van Sandau & Co., for F. E. Nicolson, Doncaster.*

Solicitor for the respondents: *B. Duncomb Seels.*

(1) [1905] 2 K. B. 239.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1908
May 29;
June 1, 2.

MAYOR, &c., OF LIVERPOOL *v.* ASSESSMENT COMMITTEE OF WEST DERBY UNION AND OVERSEERS OF WALTON.

Considered. BURNELL *v.* DOWNHAM MARKET U.D.C. [1952] 1 Q.B. 55

Considered. BURNELL *v.* DOWNHAM MARKET U.D.C. [1952] 2 Q.B. 55

Poor Rate—Rateable Value—Beneficial Occupation—Public Park—Liverpool Improvement Act, 1865 (28 & 29 *Vict. c. xx.*), *ss.* 14, 16 — *Liverpool Improvement and Waterworks Act*, 1871 (34 & 35 *Vict. c. clxxxiv.*), *s.* 52.

A corporation, not charged with the duty of providing a public park, were empowered by statute to purchase land which they might think suitable for public parks or playgrounds and places of recreation for the inhabitants of the borough, and to lay out and appropriate the same for any of such purposes, and to make by-laws for the management and regulation thereof. They were also empowered to sell or lease all or any part of the lands so acquired which should not be required for the purposes of the Act, and (by a further statute) to make by-laws for regulating the days and hours during which any park was to be open or shut, and the prices of admission on any special occasion, provided that the days on which the park might be shut should not exceed seven days in any one year. The corporation purchased land which they formed into a park and appropriated to the public use, and made a by-law under which the park might be closed for not more than seven days in any one year, and the corporation might charge or allow the person to whom the use of the park on those days was granted to make a charge for admission, not exceeding five shillings for each person. The park had not been closed for fifteen years, when the corporation had permitted it to be used for a fête in aid of a local charity, and a charge for admission was made by the persons so using the park :—

Held, that the corporation were not occupiers of the park for rating purposes, and that the park was not rateable to the poor rate.

Lambeth Overseers v. *London County Council*, [1897] A. C. 625, discussed.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) upon a case stated by the Court of quarter sessions of the city of Liverpool by order of Sutton J. in chambers under the Quarter Sessions Act, 1849, of which the following are the material parts.

1. In a poor rate made by the overseers of the poor for the township of Walton in the city of Liverpool, dated April 2, 1906, the appellants, the mayor, aldermen, and citizens of the city of Liverpool, hereinafter called the corporation, were rated and

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LIVERPOOL CORPORATION v. WEST DERBY ASSESSMENT COMMITTEE.

assessed as the occupiers of certain lands vested in them and appropriated to the use of the public as a public park and known as Stanley Park, and bowling greens, at a total gross rateable value of 293*l.* and a total net rateable value of 279*l.*

3. The lands, which comprised a total area of eighty-nine acres, were part of a total area of ninety-nine acres acquired by the corporation under the powers conferred upon them by s. 14 of the Liverpool Improvement Act, 1865 (1), and were purchased from, and conveyed to the corporation by, several different vendors. In all material points the conveyances were similar in form. They contained no trusts or other conditions which would have the effect of restricting the purchasers as to the use of the lands conveyed.

4. The corporation, after the purchase of the lands, laid out eighty-nine acres as a public park or recreation ground. Of the remaining ten acres, two acres were utilized by the corporation for street improvements and eight acres were sold or leased by the corporation under the powers conferred upon them by s. 16 of the Liverpool Improvement Act, 1865. (1)

(1) Liverpool Improvement Act, 1865 (28 & 29 Vict. c. xx.):—

Sect. 14: "The corporation from time to time, as they think fit, may purchase by agreement the fee simple, whether in possession or reversion, of and in any lands situate either within or beyond the limits of the borough, which they may think suitable for public parks or playgrounds, and places of recreation for the inhabitants of the borough, and may from time to time, as they think fit, lay out and appropriate the same, or any part or parts thereof respectively, or, with the approval of the Lords Commissioners of Her Majesty's Treasury, any lands now belonging to the corporation, for any of such purposes, and may from time to time make by-laws, rules, and orders for the management and regulation thereof, and of persons resorting thereto, and may also from time to time repeal, alter, or vary all or any of such by-laws, rules, or orders."

Sect. 16: "The corporation may from time to time sell and absolutely dispose of, or otherwise, at their option, may demise and grant, upon building or other leases, for such term of years, and to such person or corporation, and on such terms and conditions as they may think fit, all or any part of the lands to be acquired by them under the authority of this Act, which shall not be required for the purposes of this Act; and the corporation shall apply to the purposes of this Act, or towards the repayment of any money which they may borrow under the authority of this Act, the proceeds of any such sale, and the annual or other sums or rents to arise from any such lease."

5. The work of laying out the eighty-nine acres of land as a public park or recreation ground was completed in or about the year 1870, and on May 4 of that year the city council, by by-laws, rules, and orders made under the Liverpool Improvement Act, 1865, declared the park open to the public and appropriated it to their use, subject to the reservations set forth in the by-laws. On the same day the park was formally opened, and from that time forth the corporation had appropriated and devoted the park for the purpose of public resort and recreation and for use and enjoyment by the public subject to the by-laws, rules, and regulations which had from time to time been made by the city council for the regulation thereof.

By the Liverpool Improvement and Waterworks Act, 1871 (34 & 35 Vict. c. clxxxiv.), s. 52, it was provided as follows: "The corporation may make by-laws for all or any of the following purposes relating to any park or place of public resort or recreation under their control, whether within or beyond the limits of the borough, namely (1)—

"For appointing and regulating keepers or servants employed therein:

"For regulating the days and hours on or during which any footpath into or through the park or place may be closed, and during which the park or place is to be open or shut, and the terms of and prices for admission to the park or place on any special occasion: Provided that the days on which the park shall be shut shall not exceed seven days in the whole in any one year, and that on all other days no footpath shown upon the deposited plans as substituted footpaths for the public footpaths respectively authorized to be stopped up shall be closed between 5 o'clock in the morning and 7 o'clock in the evening from September 30 to April 1, or between 5 o'clock in the morning and 10 o'clock in the evening on any other days, except as aforesaid.

"For regulating the conduct of persons frequenting the park or place . . . . "

By the Liverpool Improvement Act, 1886 (49 & 50 Vict.

(1) The section enumerates in great detail the purposes for which by-laws may be made, but only the portions that are strictly material to the present case are here set out.

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c. lxxx.), s. 19, it was provided that "Notwithstanding anything contained in s. 52 of the Liverpool Improvement and Waterworks Act, 1871, or in any by-laws made thereunder, the corporation may at any time and from time to time close any public park or recreation ground under their control or any part thereof for such periods as they may think fit for the purpose of allowing the same to be used for military purposes by any of Her Majesty's regular, reserve, or auxiliary forces."

By the Liverpool Corporation General Powers Act, 1905 (5 Edw. 7, c. clxxvii.), ss. 10 and 15, it was provided as follows: "The corporation may allocate and appoint for the purpose of holding public meetings sites or spaces in the parks and other places of public resort or recreation under their control . . . . The corporation shall give public notice of the sites or spaces so allocated and appointed in such manner as they think fit.

"The power of the corporation to make by-laws under s. 52 of the Liverpool Improvement and Waterworks Act, 1871, relating to parks or places of public resort or recreation under their control shall extend to making by-laws for regulating the holding of public meetings in any such park or place . . . .

"The corporation may make payments out of the general rate for or towards the expenses of and incidental to the provision of music in any park . . . . under their control . . . ."

The by-laws at present in force are those made by the council on June 2, 1897. (1)

6. The park is laid out partly as shrubberies and ornamental grounds with a lake, plantations, and flower beds, and partly as grass land which is used for cricket, bowls, and other games. It contains (inter alia) a band-stand and other accessories strictly

(1) By-law 8 was as follows: "The parks or any part thereof may be closed on such days (in addition to any days on which the parks may be closed for military purposes in pursuance of s. 19 of the Liverpool Improvement Act, 1886) not exceeding in the whole seven days in any one year consecutive or otherwise as the corporation may by giving three days' notice at the least by advertisement in a paper published in the city, direct, and the corporation may charge or allow any person or persons to whom the use of the parks or any part thereof may have been given to charge for admission on any such days such sum as the corporation may think fit, not exceeding five shillings for each person."

incidental to its use and maintenance as a public park, including public bowling greens and a bowl-house. A house and lodge are occupied rent free by the superintendent and the park keepers respectively.

Pursuant to the powers conferred on the corporation by the statutes and by-laws hereinbefore mentioned the corporation have on several occasions (1) closed the park to the public and have permitted it to be used for purposes of a fête or fancy fair in aid of a local hospital. The corporation did not on those occasions make any charges for admission to the park, but the persons who were so permitted to use the park did in fact make certain charges for admission. Save as aforesaid, the park has never been closed to the public under the said statutes or by-laws.

The average cost of maintaining the park for the past five years amounted to the sum of 3525*l.* per annum. The average annual revenue derived therefrom during the same period amounted to the sum of 62*l.* 10*s.* The revenue-producing properties in the park consisted of—(1.) two bowling greens, let to clubs at an annual rental of 70*l.*, which sum was expended in keeping the grounds in proper condition; (2.) a boat-house on the lake, let at a rental of 7*l.* 10*s.* per annum; (3.) sums received from persons to whom keys were allotted enabling them to obtain admission into the park; (4.) permission which had been granted to the British Workman Public House Company, Limited, to erect a refreshment kiosk in the park, for which the company were to pay to the corporation an annual sum equal to 6 per cent. of their takings. This kiosk had not yet been erected.

The corporation contended that they were not liable in law to be rated in respect of the park and bowling greens on the grounds (1.) that they were not occupiers thereof, and (2.) that, if they were occupiers, they were by reason of the matters and things hereinbefore stated not liable to be rated in respect thereof.

The respondents contended that the corporation were in

(1) It was stated during the argument that the only evidence on this point was that the park was once used for the purpose of a charitable bazaar fifteen or sixteen years previously.

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occupation of the park and bowling greens and were liable to be rated in respect thereof.

The question for the Court was whether the contention of the corporation or that of the respondents was correct.

Macmorran, K.C., and *A. H. Maxwell*, for the corporation.

Horridge, K.C., and *Greer*, for the assessment committee.

LORD ALVERSTONE C.J. This appeal must be allowed. For all practical purposes the case is covered by the decision of this Court in *Manchester Corporation* v. *Chorlton Union Assessment Committee*. (1) Mr. Horridge sought to distinguish that case on three grounds—first, on the ground that the restriction upon the user of the land was imposed not by statute, as in the case of *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1) and *Lambeth Overseers* v. *London County Council* (2), on which it was based, but merely by the covenants and conditions entered into by the corporation and imposed upon them when purchasing the land. That point does not, in my opinion, arise in the present case, because I think the restrictions imposed upon their user were imposed not merely by the conveyance, but by s. 14 of the Liverpool Improvement Act, 1865, enabling the corporation in the present case to purchase land and appropriate it for parks, playgrounds, and recreation grounds. But I wish to add that, even if the restrictions were imposed merely by the conveyance, I am not prepared to say that *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1) and *Lambeth Overseers* v. *London County Council* (2) are to be distinguished on that ground.

The second ground of distinction was that this land was not permanently appropriated for the purpose of a park by the statute. By s. 14 of the Liverpool Improvement Act, 1865, the corporation "from time to time, as they think fit, may purchase by agreement the fee simple whether in possession or reversion of any lands situate either within or beyond the borough which they may think suitable for public parks or playgrounds, and places of recreation for the inhabitants of the borough, and may from time to time, as they think fit, lay out and appropriate the

(1) (1899) 15 Times L. R. 327. (2) [1897] A. C. 625.

same or any part or parts thereof respectively, or, with the approval of the Lords Commissioners of Her Majesty's Treasury, any lands now belonging to the corporation, for any of such purposes." Now that enactment confers on the corporation power to purchase land and appropriate it for parks, playgrounds, and recreation grounds. But it is said that by s. 16 the corporation may from time to time sell such lands as shall not be required for the purposes of the Act and appropriate the proceeds, and that, inasmuch as at some future time this land may become unsuitable for a park, it may at some future time be sold; and, further, that by s. 109 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the corporation may, with the approval of the Treasury, dispose by way of absolute sale of this land, or by way of exchange, mortgage, charge, demise, lease, or otherwise; and on these grounds it is argued that the land is not permanently appropriated to the use of the public as a park, playground, or recreation ground, and that the effect of the authorities is that land cannot be said to have no rateable value unless it is struck with sterility to all time. Now I desire to say here that, although the point has never been raised and decided, and although the judgment of the House of Lords in *Lambeth Overseers* v. *London County Council* (1) seems to indicate an opinion contrary to my view, I think it will some day have to be considered whether land the subject of annual valuation must not, if struck with sterility for any one year, be taken as having no rateable value for that year. But that need not be decided in the present case, for here there is land which, so far as human foresight extends, will be a park devoted to the public for generations. The statute only authorizes a sale of so much as is not required for the purposes of a park. That is not, in my opinion, enough to take this case out of the principle of *Lambeth Overseers* v. *London County Council* (1), which I take to be embodied in the words of Lord Halsbury L.C. (2) "The London County Council," said the Lord Chancellor, "purchased the land and buildings which now form the park under the powers of an Act which cast upon them the perpetual obligation to maintain and

(1) [1897] A. C. 625. (2) [1897] A. C. at p. 629.

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preserve it, when purchased, as a park." That was the force and effect of the statute in that case, and to my mind there is no satisfactory distinction between the effect of that statute and the effect of a statute which appropriates land to the uses of a park and only allows that land to be sold when it can no longer be used as a park. Then later in the judgment of the Lord Chancellor come these words: "Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose." (1)

Then Lord Herschell in his judgment said (2): "Here these very lands and every part thereof, by statute, must be held in perpetuity for the use of the public, and the question is, whether, under these circumstances, they are rateable at all. I think that on principle they are not. And the *Putney Bridge Case* (3), which, in my opinion, was rightly decided, is not distinguishable from that under consideration. Moreover I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them." Taking the facts of this case and the statute under which this land was acquired and the purpose for which it is used, I come to the conclusion that its appropriation is controlled by statute, and that, apart from the third ground of distinction, with which I will next deal, the present case falls within the principle of *Lambeth Overseers* v. *London County Council* (4), and I think we ought not to fritter that decision away or try to distinguish it in a case in which the facts are for rating purposes indistinguishable.

I now come to the last point, upon which, but for the decision of this Court in *Manchester Corporation* v. *Chorlton Union Assessment Committee* (5), we might perhaps have required further argument. It is said that by the Act of 1871 the corporation were empowered to make regulations for closing the park on seven days in the year, and that they have made a

(1) [1897] A. C. at p. 630.
(2) [1897] A. C. at p. 632.
(3) *Hare* v. *Overseers of Putney*, (1881) 7 Q. B. D. 223.
(4) [1897] A. C. 625.
(5) 15 Times L. R. 327.

by-law whereby those seven days can be used for any purpose and whereby any charge not exceeding five shillings can be made on those days for admission to the park. By this means the annual receipts of the corporation in respect of this park, stated in the case to amount to 60*l.* or 70*l.*, might be materially increased. Practically the same point arose in *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1), before Darling and Channell JJ. There the corporation had power under s. 44 of the Public Health Acts Amendment Act, 1890, to close the park for a period not exceeding twelve days nor four consecutive days, either gratuitously or for payment, for any agricultural, horticultural, or other show, or for any other purpose. Yet it was held that this did not prevent the park from being struck with sterility and not rateable. I do not desire to question that decision. It may be that such a power is merely incidental to the use of the land as a park; it may also be that, properly understood, the public are in truth the occupiers of the park and the corporation merely the custodians for the benefit of the public. But be that as it may, I think that the decision of the House of Lords in *Lambeth Overseers* v. *London County Council* (2), as applied in this Court in the case of *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1), governs the present case, and that we are bound to hold that this park is not rateable.

With regard to the former case of *Liverpool Corporation* v. *West Derby Union* (3), if it is necessary to choose between that case and *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1), I think there is a clear distinction upon the facts between the two. In *Liverpool Corporation* v. *West Derby Union* (3) the corporation had taken for use as a library an ordinary house the subject of an ordinary occupation. They might at any time have parted with the house in question, which would have lost none of its value as a house and the subject of a beneficial tenancy.

For these reasons I think that this appeal must be allowed.

RIDLEY J. I entirely concur, and have nothing to add.

(1) 15 Times L. R. 327. (2) [1897] A. C. 625.
(3) (1905) 92 L. T. 467.

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DARLING J. I am of the same opinion. It is obvious that *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1) goes further than previous cases in the direction of exempting from rateability land devoted to public purposes. But whatever misgiving I might have had as to the decision in that case is set at rest by the concurrence of my brother Channell in that decision. In my judgment we should not be fettered by the use of mere phrases, such as "struck with sterility to all time." Apparently that phrase "struck with sterility" was used by Bowen L.J. in giving judgment in the Court of Appeal in *West Bromwich School Board* v. *Overseers of West Bromwich.* (2) It has since been quoted many times and applied in cases where it is not so appropriate. The phrase "struck with sterility" is in itself open to the objection that it does not truly state the facts about the possession of the land in question in the present case. A public park has its uses as well as arable or pasture land, and yet it may be exempt from rateability. In the same way the expression "to all time" is, to my mind, merely a phrase to indicate that brief period which human creatures call a lifetime; and, apart from the fact that nature will one day resume its sway over the land in question, I should be sorry to use in its literal sense the phrase "for all time," when it is well known that the time has gone by since the Legislature of this kingdom was unwilling that the laws of England should be changed. Therefore sterility for all time is not the test of exemption from rateability. This case is covered by *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1), and the appeal must be allowed.

Appeal allowed.

The assessment committee appealed.

Horridge, K.C., and *Greer*, for the assessment committee. The corporation are in law the occupiers of the park and their occupation is rateable. The land has not been permanently appropriated by statute for the purposes of a public park so as to make its occupation that of the public. Appropriation, as that term is used in the Act of 1865, is not equivalent to dedication,

(1) 15 Times L. R. 327. (2) (1884) 13 Q. B. D. 929, at p. 943.

but is something short of it, and is consistent with the exercise by the corporation of the power given by s. 16 to sell portions of the land not required for the purposes of the Act and to acquire other land in substitution for the land sold. If a public authority, entrusted by statute with the formation, appropriation, and control of a park such as the present, can deal with it as it thinks fit and exclude the public from the park or from parts of it, it is the occupier in the strictest sense of the term, and there would in the present case be a possibility of beneficial occupation by the corporation within the rating year, which is all that is requisite. The case is distinguishable from *Lambeth Overseers* v. *London County Council* (1), for there it was a particular designated piece of land which the public authority was authorized by statute to acquire and appropriate to the purposes of a public park; there was a statutory dedication of the land to the public, and there being no power to sell or exchange it, the land was struck with sterility for ever and was not rateable. Here the public authority could acquire any land it considered suitable and sell or exchange portions of it from time to time, the exercise of which power would necessarily prevent the land from being for ever struck with sterility.

Secondly, under s. 52 of the Act of 1871, the corporation has the right to make regulations for closing the park on seven days in the year, and under their by-laws they may make a charge not exceeding five shillings for admission to the park on those days, and they may obviously make a profit from making such a charge; the existence of such a power is inconsistent with anything but the beneficial occupation of the corporation. On this point the decision of the Divisional Court in *Manchester Corporation* v. *Chorlton Union Assessment Committee* (2), though it may be distinguished on the facts, is wrong and should be overruled. [They also cited *Liverpool Corporation* v. *West Derby Union* (3); *West Bromwich School Board* v. *West Bromwich Overseers* (4); *Jones* v. *Mersey Docks* (5); *London Corporation* v. *Stratton.* (6)]

(1) [1897] A. C. 625.
(2) 15 Times L. R. 327.
(3) 92 L. T. 467.
(4) 13 Q. B. D. 929.
(5) (1865) 11 H. L. C. 443.
(6) (1875) L. R. 7 H. L. 477.

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Macmorran, K.C. (*A. H. Maxwell* with him), as to the second point only. The power to suspend free admission and to charge for entrance to the park on seven days in the year is a power of control given to the corporation as the custodians of the park in the public interest. The existence of this power does not alter the character of the occupation; it is still an occupation by the public, who cannot be occupiers for the purposes of rating. The legal ownership of the corporation is a bare trusteeship for the public, who have the beneficial occupation. Further, the mere existence of such a power, apart from its exercise, is not sufficient to make the occupation (if any) by the corporation rateable, and the only evidence of exercise of the power was that the park was once used for a charitable bazaar fifteen or sixteen years ago.

Horridge, K.C., in reply. The corporation cease to be bare trustees for the public when they are in a position to make a profit.

June 2. SIR GORELL BARNES, PRESIDENT. In order to appreciate the points which we have to decide I think it necessary to state concisely the facts from the special case. A poor rate was made on April 2, 1906, by the overseers for the township of Walton, in which rate the appellants, the Liverpool Corporation, were rated as occupiers of certain lands vested in them and appropriated to the use of the public as a public park, known as Stanley Park, and also of certain bowling greens, the rate being on a total gross value of 293*l.* and a net rateable value of 279*l.* The basis upon which the rate was arrived at was by treating the land as accommodation land, but the special case raises the question of whether the land is rateable at all. The park covers an area of eighty-nine acres which had been acquired by the Liverpool Corporation under the powers conferred upon them by the Liverpool Improvement Act, 1865, and the question for our decision turns largely upon the construction of that Act. One of the recitals in the Act is important and runs thus: "And whereas the establishment and maintenance of public parks, playgrounds, and places of recreation by the corporation would be for the public benefit of the inhabitants and improvement of

the borough, and it is expedient that the corporation should be empowered to provide such public parks, playgrounds, and places of recreation." I need refer only to a few sections of the Act. Sect. 6 deals with the general powers of the corporation to take lands for new streets, and s. 14 gives the power to acquire land for public parks. Under the latter section the corporation from time to time may purchase by agreement the fee simple in any lands which they may think suitable for public parks or playgrounds and places of recreation for the inhabitants of the borough, and may from time to time, as they think fit, lay out and appropriate the same, or any part or parts thereof respectively, and may from time to time make by-laws, rules, and orders for the management and regulation thereof, and of persons resorting thereto, and may also from time to time repeal, alter, or vary their by-laws. I may notice that the same word "appropriate" is used in s. 15 with regard to the site of a church which is to be taken down. Sect. 16 gives power to the corporation from time to time to sell and absolutely dispose of or demise and grant upon building or other leases for such term of years and to such person or corporation and on such terms and conditions as they may think fit all or any part of the lands to be acquired by them under the authority of the Act which are not required for the purposes of the Act, and the corporation are to apply to the purposes of the Act, or towards the repayment of any money which they may borrow under the authority of the Act, the proceeds of any such sale and the annual or other sums or rents to arise from any such lease. Then s. 28 deals with the application of moneys received by the corporation under the provisions of the Act "from the proceeds of the sale of any lands which may have been purchased by them by means of the improvement rate or money borrowed on the credit of that rate." That is the Act under which this park was acquired.

The corporation appear to have taken free conveyances from the owners of land of a slightly larger area, namely, ninety-nine acres, but ten acres were disposed of in ways immaterial to this case, and eighty-nine acres were appropriated as a public park, which was completed and laid out and appropriated in 1870, when by-laws

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were passed for its regulation. It is not necessary to refer at any length to these by-laws, for they were repeated in another form at a later date either under the Act of 1865 or under a later Act of 1871. The park was opened in 1870, and according to the special case was appropriated and devoted to the purpose of public resort and recreation and for use and enjoyment by the public subject to the by-laws, rules, and regulations which are from time to time made by the city council for its regulation.

The Liverpool Improvement and Waterworks Act, 1871, contains some sections to which I must refer. Sect. 52, which occurs in that part of the Act which relates to parks, provides that the corporation may make by-laws for certain purposes relating to parks or places of public resort or recreation under their control, of which the most important for the purposes of this case is "for regulating the days and hours on or during which any footpath into or through the park or place may be closed, and during which the park or place is to be open or shut, and the terms of and prices for admission to the park or place on any special occasion; provided that the days on which the park shall be shut shall not exceed seven days in the whole in any one year, and that on all other days no footpath shown upon the deposited plans as substituted footpaths for the public footpaths respectively authorized to be stopped up shall be closed between 5 o'clock in the morning and 7 o'clock in the evening from September 30 to April 1, or between 5 o'clock in the morning and 10 o'clock in the evening on any other days except as aforesaid." Then follow a good many other purposes for which by-laws may be made, all of which, so far as is material to the present case, seem substantially to relate to the good government and proper protection of the parks. Then s. 107, sub-s. 7, provides that "any by-law shall not take effect until it is allowed by one of Her Majesty's principal Secretaries of State (who may allow or disallow the same as he thinks proper and from time to time repeal or vary the same)." The by-laws at present in force are those of 1897, of which by-law 8 is as follows: "The parks or any part thereof may be closed on such days (in addition to any days on which the parks may be closed for military purposes in pursuance of s. 19 of the Liverpool

Improvement Act, 1886) not exceeding in the whole seven days in any one year consecutive or otherwise as the corporation may by giving three days' notice at the least by advertisement in a paper published in the city direct, and the corporation may charge or allow any person or persons to whom the use of the parks or any part thereof may have been given to charge for admission on any such days such sum as the corporation may think fit, not exceeding five shillings for each person." With regard to the Liverpool Improvement Act, 1886, s. 19 contains a provision that, notwithstanding anything contained in s. 52 of the Liverpool Improvement and Waterworks Act, 1871, or in any by-laws made thereunder, the corporation may at any time and from time to time close any public park or recreation ground under their control or any part thereof for such periods as they may think fit for the purpose of allowing the same to be used for military purposes by any of Her Majesty's regular, reserve, or auxiliary forces. I do not think that any argument based on that section was addressed to us. I have now substantially referred to all the Acts and by-laws to which reference must be made if the point which I have to consider is to be made plain.

Paragraph 6 of the case describes at some length what has been done with this park, but I may state this generally. There are varieties of shrubs, shelters, pavilions, and so forth, bowling greens and an aviary, a park superintendent's house, and a lodge for park keepers—in short, what is usually understood by a public park. Then there is a statement in paragraph 7 to which I must refer: "Pursuant to the powers conferred on the corporation by the statutes and by-laws hereinbefore mentioned the corporation have on several occasions closed the park to the public and have permitted it to be used for the purposes of a fête or fancy fair in aid of a local hospital. The corporation did not on these occasions make any charges for admission to the park, but the persons who were so permitted to use the park did in fact make certain charges for admission. Save as aforesaid, the park has never been closed to the public." Apparently, therefore, for thirty-eight years the corporation have never themselves exercised the power of closing the park for the purpose of themselves making any charge on any special occasion. The actual

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cost of working the park, taking it on the average for the last five years, appears to be 3525*l.*, and there is a small income to divide during those years of 62*l.* 10*s.* per annum; some of this seems to have been derived from the use of bowling greens which are let to clubs, from a charge for a bar, and other small items of revenue. In these circumstances the appellants contend that they are not liable in law to be rated in respect of the park and bowling greens, on the grounds, first, that they were not the occupiers, and, secondly, that, if they were such occupiers, they were by reason of the matters and things stated in the case not liable to be rated in respect thereof. The respondents contended that the appellants were in occupation of the said park and bowling greens and were liable to be rated in respect of the same. The Divisional Court has decided in favour of the corporation and has quashed the rate. From that there is this appeal.

I do not think it necessary to consider the cases or statutes at any length. It is clear that the corporation can only be rated if they are occupiers under the statute of Elizabeth; and the further point can be raised by them, that, even if they are occupiers in a strict sense, there was no beneficial occupation within the meaning placed upon that term by decided cases. It was practically admitted in the course of the argument that this case is governed by *Lambeth Overseers* v. *London County Council* (1), unless the points suggested during the argument destroy the effect of that decision so far as it is applicable to the particular case. One of these points depends upon the construction of ss. 14 and 16 of the Act of 1865, the contention of the corporation being that by virtue of those sections they have bought and appropriated to the public use the park in question, and that they are not able to depart from that appropriation, except to the limited extent that if, in laying out the park, it were found that certain small portions, or trimmings, of the ground were not necessary for the park, they could be disposed of. But the broad point is that, the park having been appropriated to the public by the corporation under s. 14 of the Act of 1865, there is no longer any power to sell or dispose of or in

(1) [1897] A. C. 625.

any way deal with that park except by using it for the public interest and for the open use of the public as that park is required, and required always so long as things endure on their present footing, for the purposes of the Act. The contention on the other side, as I understand it, is that the true construction of the sections is that the corporation are not pledged by the appropriation that has been made; that they may dispose of this ground as and when they please and substitute or buy other lands or deal with the matter as they think most suitable. The whole question between the parties is therefore one of construction.

In my opinion, considering the Act as a whole, and having especial reference to s. 14 and to the limitation on the powers of disposition in s. 16, the construction contended for by the corporation is correct; that is, as one would expect when matters are being dealt with for the benefit and improvement of the city, this park is intended to be dedicated to the public for the public use alone. If the view which I take of the construction of the Act is correct, that puts an end to the case except upon one point, which may be very shortly stated. It is this: by virtue of the power to make by-laws conferred by the Act of 1865, amplified possibly by the like power in s. 52 of the Act of 1871, the position of the corporation has been affected by turning them from being persons who are not occupiers into persons who are occupiers. I say that for this reason: in considering the first question I ask myself what is the logical outcome of the different contentions on the two sides, and having regard to the principles enunciated in *Lambeth Overseers* v. *London County Council* (1), I think that, if the evidence of the corporation is correct, they have dedicated and appropriated this park to the public use and cannot withdraw from that position. That being so, they are not occupiers, but mere custodians or guardians of the property for the public, who are themselves the occupiers. I think that the position would be different if, upon the terms of this statute, the corporation had immediate power of disposal of the property, for there would then be no appropriation to the public, and the corporation would be in a position in which

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they could utilize the ground in some other way, probably beneficial. The logical outcome, therefore, of deciding which contention is correct is that the corporation are the custodians or guardians, and the public the occupiers, of this park, and that the position is just the same as in *Hare* v. *Putney Overseers.* (1)

There is a second point in the case, which is that by virtue of the Act itself the corporation have taken themselves out of the position of being mere custodians or guardians, because they have reserved to themselves a right which is described as being a right of occupation during seven days in each year. It is difficult to see how that would work out. If it were to be treated as reserving a right of occupation for a particular day or for any seven days which might or might not be chosen, it is difficult to see how the non-occupation can be converted into an occupation by the corporation simply because they have reserved to themselves the right of closing the park for seven days in the year. But the matter does not rest there, for in my opinion this power, which is contained in the power to make by-laws provided in s. 52 of the Act of 1871, is really part and parcel of that which is done for the public benefit for the purpose of regulating the park. It is done under this section, which gives power to make by-laws for keeping the park under proper control, one of them, for example, giving power to exclude the public on special occasions. If that is the proper view to take of this power, there is no real interference with the occupation of the public, and the corporation are not converted into occupiers by reason of the fact that on special occasions the public may be excluded, which means that on special occasions it would be to the public interest that there should be a reservation for a special purpose. I do not wish to wander from these observations into what might prove to be a more difficult inquiry, from which I think Mr. Macmorran succeeded in keeping clear. I do not think it makes any difference whether this power has been utilized by the corporation or not: assuming, however, that it would make a difference, the corporation has not in fact taken any step to utilize its powers of keeping the park open for a special occasion and charging for admission on

(1) 7 Q. B. D. 223.

such occasion; they have not in fact done anything that could convert them from non-occupiers into occupiers of the park. Had they done so, the question might arise whether their occupation could be one which was capable of producing a beneficial result. I think it better, however, to say nothing upon that head, for we have no figures before us to serve as a guide. Speaking broadly, it is difficult to see how the corporation can be said to make any profits if the admission fees which they may receive are set against the cost of keeping up the park. No such case was suggested in the course of the inquiry which led to the statement of the special case, and it is extremely doubtful whether such a case could be made out. That seems to me to dispose of the case. Starting with what is practically an admission that this case is governed by *Lambeth Overseers* v. *London County Council* (1), unless it can be distinguished on the two grounds to which I have referred, and which have, I think, been disposed of, I think that the decision of the Divisional Court was right and must be upheld.

FLETCHER MOULTON L.J. I am of the same opinion. The case is best dealt with by first of all putting out of sight the question of the seven days during which the park may be used for special purposes and then considering whether the existence of that power makes any difference to the liability of the corporation. We then have the corporation acquiring the fee simple of certain lands under the powers of s. 14 of the Liverpool Improvement Act, 1865, and laying them out and appropriating them for a public park. In *Lambeth Overseers* v. *London County Council* (1) it is clearly laid down by the House of Lords that there is in such a case no occupation by the corporation or other public body owning the fee simple of the land. Lord Halsbury L.C. says, "I do not think that there is here a rateable occupation by anybody; the 'public' is not a rateable occupier"; and Lord Herschell says substantially the same: "Moreover, I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or

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trustees to hold it and manage it for the use of the public." We start therefore with this, that the purpose for which the park is appropriated is not one which makes the corporation rateable occupiers at all.

Then it is suggested that the provisions of s. 16 alter the position of the corporation in this respect because under that section they might sell and dispose of the land. I do not feel sure that s. 16 does enable them to dispose of land which has once been appropriated for a public park, but I am clear that it does not give the corporation power at their own will and pleasure to sell the park or any portion of it. All that they may sell is that portion of the land which is not required for the purposes of the Act, and beyond question this land is not only appropriated for the purposes of the Act, but is required as much as it ever was for those purposes; s. 16 therefore has no present application to this land, and I am disposed to think it never can have. But we are only dealing with the rate for a particular year, and I say without the faintest hesitation that throughout the whole of that year this land was, and might be foreseen to be, required for the purposes of the Act, and it was therefore as entirely free from the provisions of s. 16 which empower the corporation to sell as if those powers were not to be found in the Act at all. Taking ss. 14 and 16 together, I incline to think that it was intended that the dedication should be for ever; in any event it is a dedication of so permanent a kind that no doubt can exist that the occupation during the year under consideration was an occupation solely as a public park under statutory powers and restrictions. That being so, we have the authority of *Lambeth Overseers* v. *London County Council* (1) for saying that such an occupation is not a rateable occupation.

Next, has the nature of the occupation been in any way altered by the special power given to use this park for special purposes on a small number of days in the year? The Act of 1871 has been appealed to by both sides as giving the power to use the park in this exclusive way for not more than seven days in the year. Reading s. 52 of that Act, I do not find that it purports to increase the powers of user; I find indeed power to make by-laws

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to regulate certain uses, but no increase of the powers of user given by the original statute. We are therefore thrown back on one of two alternatives. Either a user such as this is impliedly granted in the dedication as a public park, or it is not granted at all by any of the previous statutes; and then s. 52 must be read as meaning that, wherever the possession of land by the corporation is such as to permit them to use it for this special purpose, they may make by-laws under s. 52 to regulate such user. It will be observed that s. 52 applies generally to land possessed by the corporation, and no doubt the corporation have land which they have acquired in a variety of ways. Of some they may be possessors of the freehold, and could, if they liked, exclude the public at any moment, the user by the public being purely permissive: such lands the corporation would naturally have the power to use for this special purpose, and under s. 52 they would have the power to make by-laws for that purpose. But s. 52 must in such a case be read as meaning that where the corporation have power to use the land for this special purpose they shall not do it for more than seven days in the year, and that then they shall be empowered to make by-laws with regard to that user. Personally I prefer the other alternative, namely, that a moderate and properly restricted use of this sort (although of an exclusive nature) is ancillary to, and not excluded by, the dedication of the land as a public park. If that be so, the provisions of the Act of 1865 which entitled the corporation to dedicate the land as a public park impliedly gave them the power of using it in this special way, because it is better for the public that the corporation should have than that they should not have these moderate powers of exclusion. But it does not make the occupation by the corporation a beneficial occupation or inconsistent with the dedication as a public park: that is the result of *Lambeth Overseers* v. *London County Council*. (1) I prefer this alternative, because I think that the view of the Legislature was that these powers were merely ancillary to the possession and use of the park, and therefore they gave power to make by-laws to regulate the mode of user in this way, and I am confirmed in this view by finding that in

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1890 the Legislature passed a general Act applicable to all places outside the metropolis which gave a limited power of this nature to all local authorities possessing public parks. I cannot believe that by such a general Act the Legislature intended to alter the nature of the possession of such parks by public authorities so as to make that rateable which was not rateable before. I think the Legislature only intended to recognize in a statutory way that a limited power of this kind is ancillary to the user of the land as a public park, and that accordingly a statutory power of regulation ought to be given.

I therefore come to the conclusion that this power of user for a special purpose for a small number of days does not alter the character of the occupation, or render it rateable where it otherwise would not be so; in fact it is on the same footing with the grazing rights which were admitted to exist in *Lambeth Overseers* v. *London County Council.*(1) Grazing rights are, in themselves, essentially of the nature of a beneficial occupation; but the House of Lords there recognized that such matters as grazing rights and the power to erect band-stands (which amounts to an exclusion of the public from the site where they are erected) were reasonable powers for increasing the public user and public enjoyment of the park, and were in no sense antagonistic to the complete dedication of the park as a public park. For these reasons I think that the existence of this power does not alter the character of the occupation, which remains unrateable, just as it was in *Lambeth Overseers* v. *London County Council.* (1)

FARWELL L.J. I am of the same opinion. By clause 5 of the special case it is found that on May 14, 1870, the city council declared the park open to the public and appropriated to their use, subject to the reservations in the by-laws. In my opinion from that day these lands and every part thereof must be held in perpetuity to the use of the public and are therefore not rateable.

On the construction of the Act I have very few words to add. The preamble shews that the intention was to establish and

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maintain public parks, playgrounds, and places of recreation by the corporation for the benefit of the inhabitants and the improvement of the borough. Sect. 14 gives a power to acquire by purchase the fee simple and to appropriate the same or any part thereof for public purposes. It is to be noted that the power to purchase and the power to appropriate are co-extensive and fitted in the one with the other: there is no power to appropriate "the same or any interest therein," but it is the whole of the fee simple purchased which is to be appropriated. When we come to s. 16, it must be borne in mind that s. 6 gives the power of acquiring land for other purposes and that the Lands Clauses Acts are incorporated, and that s. 16 is neither more nor less than a surplus land section; in fact, the words used are those used in the preamble to the fasciculus of sections in the Lands Clauses Act, 1845, which deal with surplus lands. The words "from time to time" of course do not apply so as to cut down the appropriation which has already been made, but refer to the lands acquired under the Act or from time to time, not necessarily all at one time, either for parks or roads and streets, which are mentioned in s. 6; those words create no difficulty. The rest of the section simply provides that the corporation may sell all or any part of the lands to be acquired by them under this Act which shall not be required for the purposes of this Act. This land, having already been irrevocably appropriated, can no longer fall within those words. The corporation can no more treat as surplus lands under this section part of this park than a railway company can so treat part of its permanent way; it is required for the purposes of the undertaking. The appropriation is an act done and made once for all, and, when made, is conclusive. That being so, the case falls within the principle of *Lambeth Overseers* v. *London County Council*. (1)

Then, does the provision as to the seven days make any difference? In my opinion it does not. The by-laws, which must be allowed by the Secretary of State, are for the good management of the park as dedicated to the public. I can find nothing to warrant the suggestion that the corporation are to

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be allowed to use the park on those days for their own profit. The object appears to me to be to enlarge the public benefits intended to flow from its use as a park by allowing the park to be utilized during the seven days for some charitable or public purpose for which a small charge may be made, or possibly to enable the corporation themselves to recoup the expense to which they may be put by holding some show there which may be of general public interest. I very much doubt whether on the true construction of these by-laws the corporation are entitled to use the park for the purpose of making a profit for themselves, and I incline to think that the Attorney-General might successfully interfere to prevent their doing so. This power of making a charge is only inserted as it were parenthetically in a number of by-laws for the better regulation of the park as a public park; but assuming that by a strained construction it could be held to include a right in the corporation to make a charge for entry for their own profit, they have never in fact done so, and I am unable to see how the mere existence of such a power, assuming it does exist, can turn that which according to *Lambeth Overseers* v. *London County Council* (1) is not an occupation by the corporation into an occupation for their own benefit; it only enlarges to a very small extent that power of exclusion and of making charges which was found in *Lambeth Overseers* v. *London County Council* (1) by excluding during the night and by making the charges which were referred to in that case. I think that the present case is governed by *Lambeth Overseers* v. *London County Council.* (1)

Appeal dismissed.

Solicitors for assessment committee: *Sharpe, Parker & Co., for Cleaver, Holden & Co., Liverpool.*

Solicitors for corporation: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

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W. J. B.

BLOOR, Appellant *v.* BECKENHAM URBAN DISTRICT COUNCIL, Respondents.

1908
May 27.

Local Government—Street—Sewer—Satisfaction of Urban Authority—Evidence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

In a road which was a street within s. 150 of the Public Health Act, 1875, but which was not a highway repairable by the inhabitants at large, an urban authority in 1881, at the cost of the rates, constructed a sewer for soil only, the surface-water from the road and the adjoining houses, both before and after 1881, being carried away by channels at the side of the road. In 1904, there having been no change since 1881 in the number or character of the adjoining houses, the urban authority gave notice under s. 150 to the frontagers in the road to construct a sewer in the road for the purpose of carrying away the surface-water. The frontagers, contending that the road was not a street not sewered to the satisfaction of the urban authority within s. 150, did not comply with the notice, and on their default the urban authority themselves constructed the sewer and sought to charge the expenses on the frontagers:—

Held, that it was a question of fact for the justices whether the road was a street not sewered to the satisfaction of the urban authority, and that the fact that the urban authority had themselves constructed a sewer in the road in 1881, and had done nothing further with regard to the drainage of the road until 1904, did not as a matter of law preclude the justices from finding as a fact on the evidence that in 1904 the road was not sewered to the satisfaction of the urban authority.

Case stated by justices for the petty sessional division of Bromley in Kent.

The facts stated in the case were in substance as follows: The appellant was the owner of premises within the respondents' district fronting on Kingswood Road, which was a street within the meaning of s. 150 of the Public Health Act, 1875 (1), but which was not a highway repairable by the inhabitants at large.

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 150 gives power to an urban authority, if a street (not being a highway repairable by the inhabitants at large) is not sewered to their satisfaction, to give notice to the owners or occupiers of premises fronting, adjoining, or abutting on the street to sewer it; and if such notice is not complied with, the urban authority may execute the works themselves and recover the expenses from the frontagers in such proportion as may be settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by the Act.

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Up to the year 1881 the soil sewage of the houses abutting on Kingswood Road was drained into cesspools, and the surface-water from the houses and gardens and from the road was carried away by channels, which had been constructed at the side of the road when it was originally laid out by the owners of the land upon which the road was made, into a ditch at the northern end of the road and into a gully at the southern end, from which gully it was carried by means of pipes into a culvert and thence into a river. The gully and pipes had not been constructed by and had never been cleaned or repaired by the respondents.

In 1878 the Beckenham Local Board, the then local authority of the respondents' district, commenced to carry out schemes for the drainage of the district, at the cost of the rates, into the metropolitan system of sewers, which is a dual system whereby surface-water is drained by means of separate sewers from those by which soil is drained; and in 1881 a contract was made between the board and a contractor for the construction of soil and surface-water sewers in Kingswood Road and other roads in a part of the district known as Shortlands. On October 14, 1881, the board resolved that, as Kingswood Road and certain other roads in Shortlands were not repairable by the public at large, the surface-water drains should be omitted from those roads, and that notice of that intention should be given to the contractor. Accordingly the surface-water sewer provided for in the contract was not constructed in Kingswood Road, but the soil sewer was constructed, and the expense thereof was defrayed by the board out of the rates. The soil sewer was a nine-inch pipe, and from the time of its completion until July 5, 1904, the rainfall from the roofs and curtilages of the houses abutting on the road for the most part percolated into the ground, the remainder reaching the roadway, where it was carried away by the channels on each side of the road.

The carrying capacity of the soil sewer was sufficient to take all the surface-water of the road and of the houses and gardens; but the sewer was not such a sewer as would have been constructed had it been intended to take both soil and surface-water, and, except such surface-water as might have percolated into or

through joints which had ceased to be water-tight, no surface-water from the road or the houses or gardens had been drained into or by means of the sewer. No means whereby surface-water could be drained into the sewer were provided when it was constructed, and the sewer was never intended for the drainage of surface-water as well as for the drainage of soil. Evidence was, however, given on behalf of the appellant, which was not contradicted, that at the time of the notice of July 5, 1904, hereinafter referred to, the whole of the surface-water could have been drained into the sewer by means of gullies, and adequate provision for the prevention of flooding could have been made by the construction of storm-water outlets, and in this way the entire system of drainage of the road could have been rendered satisfactory at a less cost than by the construction of the second sewer hereinafter referred to.

In 1891 the board resolved that notices should be served under s. 150 of the Public Health Act, 1875, upon the owners of premises abutting on a portion of the road requiring them to execute certain repairs to the road with a view to the road being subsequently taken over and maintained by the parish. The surveyor to the board reported as to the cost which would be incurred to put the road into satisfactory repair and to properly drain it, and as to the further cost which would be necessary to complete it to the full extent required by s. 150 so as to allow of the road being taken over. The board recommended that notices should be served under s. 150 calling on the owners to carry out the complete work, but in consequence of a memorial from the frontagers by which they undertook to carry out the necessary repairs and to maintain the road afterwards, the board resolved to suspend the issue of the notices.

In 1904 the attention of the respondents was drawn to the condition of the road, and it was alleged by the frontage owners that it was impossible for them to drain the surface-water from their lands; and, on March 14, 1904, the respondents resolved that notices should be served on the whole of the frontage owners to provide efficient surface-water drainage, and in pursuance of this resolution the respondents on July 5,

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1904, by a notice in writing required the respective owners of the premises fronting, adjoining, or abutting upon Kingswood Road to sewer the same within the time and in the manner specified in the notice and according to the deposited plans and sections. The work required by the notice was the construction of a sewer in the road for the purpose of carrying away surface-water therefrom.

The notice was not complied with, and subsequently the respondents constructed the surface-water sewer. The proportion due from the appellant of the expenses incurred in carrying out the work was 60*l.* 15*s.* 6*d.*, which sum he had not paid, and in respect of the non-payment thereof the respondents preferred a complaint against the appellant.

Between June 23, 1881, and July 5, 1904, there had been no change in the number or character of the houses abutting upon the road or in the character of the road itself, and, except that the condition of the road owing to the want of surface-water drainage had become worse, the requirement thereof as to sewerage had not increased or materially changed, and no sewage or surface-water drained into it from any other place.

The surface-water of part of Kingswood Road was still drained into the culvert, and no notices under s. 150 had been served in respect of that part of the road.

On the part of the appellant it was contended that the respondents had no power by the notice to require the appellant to sewer the road as therein specified or to make the apportionment upon or to recover the amount thereof, or any part of the same, from him, on the ground that on July 5, 1904, the road was not a street not sewered to the satisfaction of the urban authority within the meaning of s. 150 for the reasons following: (*a*) In 1881 the then urban authority had sewered the road; (*b*) the sewer then made had then become, and until July 5, 1904, had remained, vested in the urban authority for the time being; (*c*) such authority from the time when they had sewered the road in 1881 until July 5, 1904, had not required or attempted to require the respective owners or occupiers of the premises fronting, adjoining, or abutting on the road or any part thereof to sewer the same; and (*d*) upon the facts above

stated the road had been and was sewered to the satisfaction of the urban authority prior to and upon July 5, 1904.

On the part of the respondents it was contended that it was a question of fact for the determination of the justices whether or not when the Beckenham Local Board had constructed the soil sewer in the Kingswood Road the road was completely sewered to their satisfaction, and whether or not the road had ever prior to the passing of the resolution of March 14, 1904, become sewered to the satisfaction of the board or of the respondents; that until provision was made by the construction therein of a sewer for the drainage of surface-water therefrom the road was never in fact completely sewered, and the respondents were not, therefore, when they passed the resolution of March 14, 1904, debarred from expressing dissatisfaction with the way in which the road was drained and from resolving that it was not sewered to their satisfaction.

The justices decided that it was a question of fact whether on July 5, 1904, Kingswood Road was a street not sewered to the satisfaction of the urban authority for the district within s. 150 of the Public Health Act, 1875, and they decided that the road was such a street, and they ordered that the appellant should pay to the respondents 60*l.* 15*s.* 6*d.*, together with interest and costs. The question for the opinion of the Court was whether the justices were justified in so holding.

Macmorran, K.C. (*Heber Hart* with him), for the appellant. On the facts stated in the case the justices were bound to hold as a matter of law that this road was not a street not sewered to the satisfaction of the respondents, and that the respondents had, therefore, no power in 1904 to require the frontagers to put in a sewer under s. 150. Applying the doctrine laid down in *Bonella* v. *Twickenham Local Board* (1), the fact that the urban authority themselves constructed a sewer in the road in 1881 and took no further step in connection with the drainage of the road and the adjoining houses until 1904 raises a presumption of law that the road was sewered to their satisfaction. It is suggested that,

(1) (1887) 20 Q. B. D. 63.

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because the sewer constructed in 1881 was only a soil sewer, the respondents are not precluded from now requiring the construction of a surface-water sewer, but there is no distinction in the Act of 1875 between different kinds of sewers, and the frontagers could under s. 21 have insisted on draining their surface-water into the soil sewer. The dual system of sewers was first dealt with by s. 9 of the Private Street Works Act, 1892, which, if adopted, supersedes s. 150 of the Act of 1875. If it be said that the absence of a surface-water sewer in 1881 is proof that the local authority could not in 1881 have been satisfied that the road was sewered, the answer is twofold: First, that a street may be sewered to the satisfaction of the urban authority even though the sewer is in fact incomplete or imperfect: *Hornsey Local Board* v. *Davis* (1); *Rishton* v. *Haslingden Corporation* (2); *Wilmslow Urban District Council* v. *Sidebottom* (3); secondly, the channels at the side of the road which carried off the surface-water were themselves sewers: *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council* (4); and therefore there were sewers in the road for both soil and surface water, with which the urban authority were satisfied.

R. C. Glen (*A. A. Bethune* with him), for the respondents. It is a question of fact in each case, and it was so treated in *Bonella* v. *Twickenham Local Board* (5), whether a street, in respect of which the urban authority are seeking to put in force s. 150, has been sewered to their satisfaction. It may be that where an urban authority has had a sewer within its district for a long time without expressing dissatisfaction with it, as in *Bonella's Case* (5), that is evidence that the urban authority are satisfied with it; but on the facts found in the present case it cannot be said that there was not some evidence on which the justices could find that this road was not sewered to the respondents' satisfaction. *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council* (4) does not touch the point raised in this case. The Court there were not dealing with s. 150, and there were reasons why it was not open to the local authority to deny

(1) [1893] 1 Q. B. 756.
(2) [1898] 1 Q. B. 294.
(3) (1906) 5 L. G. R. 80.
(4) [1903] 2 Ch. 695.
(5) 20 Q. B. D. 63.

that the channel was a sewer. [He referred to *Kinson Pottery Co.* v. *Poole Corporation* (1); *Walthamstow Local Board* v. *Staines.* (2)]

[He was stopped.]

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. This case raises a question of some difficulty, and one which certainly deserves to be carefully considered, having regard to the able arguments which have been addressed to us on both sides. The contention of the appellant is, in substance, that, upon the facts stated in the case, the justices ought to have held as a matter of law, or as so conclusively proved in fact, that they had no right to come to a different conclusion, that the road had in 1881 been sewered to the satisfaction of the respondents' predecessors, the local board; and that the respondents were, therefore, not entitled in 1904 to put in force the provisions of s. 150 of the Public Health Act, 1875.

It is important in the first place to ascertain what was the question which the justices put to themselves. [The learned Chief Justice read the contention of the respondents and the finding of the justices set out above, and continued:—] In my opinion it cannot be said, after that clear statement of the contention and the finding, that the justices did not consider the proper question. The difficulty which I felt during Mr. Macmorran's argument, which was, however, removed by Mr. Glen, was whether upon the facts it could be contended that the board had not in 1881 practically decided that the sewer which was then constructed was a sufficient sewer; and at first I was inclined to think that the judgments in *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council* (3) supported the argument of the appellant, on the ground that if the channels at the side of this road were to be regarded as sewers for the purpose of the surface-water drainage, as the channel was held to be in the *Llandaff Case* (3), then there was in 1881 a complete sewerage system in the road with which the board was then satisfied. But, upon

(1) [1899] 2 Q. B. 41. (2) [1891] 2 Ch. 606.
(3) [1903] 2 Ch. 695.

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Lord Alverstone C.J.

consideration, I do not think that either the *Llandaff Case* (1) or *Kinson Pottery Co.* v. *Poole Corporation* (2) has any very direct bearing upon this case, for in neither of those cases was the Court considering the provisions of s. 150, and the observations in the former case as to a channel at the side of a road being a sewer were made with regard to the duty of a local authority to prevent the channel from becoming a nuisance or dangerous to health, and in the latter case the question turned on the liability of the owner of premises who had allowed dirty water to pass from his premises into a surface-water drain. In my opinion neither of these decisions helps us in the present case. In considering the question raised by this case, one cannot exclude the fact that this road has never been taken over by the local authority. It is true that the local authority did in 1881 cause a soil sewer to be constructed in the road. It is possible that when they ordered that to be done they might have acted under s. 150, and I am not sure that, if they had then acted under s. 150, different considerations might not have arisen, but it is clear that there was, in fact, no step taken under s. 150 until the notices were given in July, 1904. If, on the facts proved, we are bound to hold as a matter of law that, when the local authority caused the sewer for soil purposes to be constructed in 1881 they must be taken to have been satisfied that the road was sufficiently sewered, it follows from the decision in *Bonella* v. *Twickenham Local Board* (3) that the respondents cannot now be heard to say that they are not satisfied. But what are the facts? The case states what happened in 1881. The local board had contemplated the construction of surface-water drains in this very road, and they entered into a contract for their construction, and it is quite clear, therefore, that at that time they did not consider that a sewer for soil purposes only would be all that was required, because in the resolution of October, 1881, it is stated that the reason for abandoning the surface-water drain was that, the roads not being repairable by the inhabitants at large, it was not considered necessary to put in surface-water drains. Then the

(1) [1903] 2 Ch. 695. (2) [1899] 2 Q. B. 41.
(3) 20 Q. B. D. 63.

question came up again in 1891, and the board were advised that, in order to make up and drain the road so that it could be taken over, a certain expenditure would have to be incurred. The board thereupon resolved that that should be done, and that notices should be served on the frontagers under s. 150, but in consequence of the memorial from the frontagers, who undertook to do the necessary repairs and to maintain the road, the board agreed to suspend the service of the notices under s. 150. These facts, in my opinion, all go to prove that nothing has been done by the local authority to shew that they were in fact satisfied in 1881 that the road was sufficiently sewered. I quite agree that where a sewer has been made in a road and the road is subsequently taken over by the local authority, then, as Lord Esher said in *Bonella* v. *Twickenham Local Board* (1), "if after the lapse of a reasonable time they have done nothing and expressed no view on the subject, I think that must be taken, for the purpose of the application of those sections, to be conclusive as a matter of fact that at that time they were satisfied with the sewer for the purposes for which it was then used"; but it would be going much further to apply that doctrine to a case where, upon the facts proved, it is clear that at two definite periods, namely, in 1881 and 1891, the road was not sewered to the satisfaction of the local authority and that they only abstained for special reasons from putting s. 150 into force, the reason on the last occasion being that they were requested by the frontagers not to do so; and now those same frontagers, or their successors, contend that on the principle laid down in *Bonella* v. *Twickenham Local Board* (1) the local authority must be assumed to have been satisfied with the existing sewer, and that they therefore cannot now act under s. 150. I think that it is impossible to say that the justices were wrong in considering as a question of fact whether or not there was evidence that the road had ever been sewered to the satisfaction of the local authority. I think the justices had power to deal with the question as one of fact, and on their findings of fact this appeal must be dismissed.

(1) 20 Q. B. D. 63, at p. 66.

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DARLING J. I am of the same opinion and for the same reasons.

SUTTON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Ford, Lloyd, Bartlett & Michelmore.*
Solicitor for respondents: *R. Borrowman.*

F. O. R.

1908

July 3.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* TATE.

Criminal Law—Evidence of Accomplice—Absence of Corroboration—Omission of Judge to caution Jury—Effect of on Conviction.

Where a prisoner is convicted upon the uncorroborated evidence of an accomplice the Court of Criminal Appeal may quash the conviction if the judge at the trial omitted to caution the jury against convicting upon such evidence.

APPEAL to the Court of Criminal Appeal against a conviction.

The prisoner was indicted before Phillimore J. for sodomy with a boy. The case for the prosecution was rested upon the evidence of the boy, who was sixteen years of age and a consenting party. The only corroboration of his evidence that was relied upon by the prosecution was the fact that when the prisoner was formally charged with the offence by a police constable at the time of his arrest he made no reply. The prisoner was called as a witness at the trial, and denied the whole of the boy's statements. The judge, when directing the jury, omitted to advise them that they ought not to convict upon the uncorroborated testimony of an accomplice, and simply left it to them to say which of the two stories they believed. The jury found the prisoner guilty, and the judge sentenced him to five years' penal servitude. The prisoner appealed against the conviction.

Brodrick, for the prisoner. The judge misdirected the jury in omitting to caution them against convicting upon the unsupported

evidence of the boy, who was an accomplice in the offence. And there was no sufficient corroboration of his evidence. Mere non-denial of the charge cannot be regarded as in the nature of an admission of guilt.

W. H. Nash, for the Crown. The omission on the part of the judge to caution the jury was admittedly a departure from a well-established practice. But the giving of the caution is matter only for the discretion of the judge, and the neglect to give it will not affect the validity of the conviction. In *In re Meunier* (1) Cave J. said: "No doubt it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground." Moreover, there was here in fact corroboration of the boy's evidence in the fact of the prisoner's silence when charged. An innocent person when charged with a crime of this nature would presumably indignantly repudiate it. In *Reg.* v. *Cramp* (2), where the prisoner was indicted for administering noxious drugs to a woman with intent to procure miscarriage, the only evidence against the prisoner besides that of the woman was that of her father, who deposed that he said to the prisoner, "I have here those things which you gave my daughter to procure abortion," and that the prisoner did not deny the charge. Denman J. directed the jury that that afforded some corroboration.

Brodrick in reply.

The judgment of the Court (Lord Alverstone C.J., Ridley and Darling JJ.) was delivered by

LORD ALVERSTONE C.J. In this case we are asked to set aside the conviction of the prisoner upon the ground that, the prosecution being based upon the evidence of an accomplice, the judge misdirected the jury in omitting to tell them that in the absence of substantial corroboration they ought to acquit. I agree with Mr. Nash that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice,

(1) [1894] 2 Q. B. 415, at p. 418. (2) (1880) 14 Cox, C. C. 390.

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and probably Cave J. did not state the law too strongly when he said in *In re Meunier*(1): "It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the jury in each case. No doubt it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground"; but I think he ought to have added, "assuming that the jury was cautioned in accordance with the ordinary practice." In my opinion it is of the highest importance that the jury should be so directed. In Taylor on Evidence, 10th ed. p. 688, the practice is thus stated—"Judges . . . . in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of a judge. Considering too the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice." That appears to me to be a correct statement of the practice. And in Russell on Crimes, 6th ed. vol. 3, p. 646, it is said that, although the practice in strictness rests only upon the discretion of the judge at the trial, "it may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' and a deviation from it in any particular case would be justly considered of questionable propriety."

In the present case the judge did not direct the jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner, thereby leading them to suppose that if they believed the accomplice's story they might properly convict although his evidence was entirely without corroboration. Under these circumstances we are of opinion that there has been

(1) [1894] 2 Q. B. 415, at p. 418.

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a miscarriage of justice, and that the conviction should be set aside.

We should not, however, have taken this view, notwithstanding the judge's departure from the practice, if we thought that there was in fact substantial corroboration upon the evidence. But in our opinion there was no such corroboration. What was relied upon by the prosecution as corroboration was the fact that the prisoner, when formally charged by the police constable, made no reply. It may be that in some cases the absence of an indignant repudiation of a charge might be some corroboration, but we do not think it was so under the circumstances of the present case. In the case of *Reg.* v. *Cramp* (1) there was something more than a mere charge of a crime; there was a statement by the person making it that he had in his possession the evidences of the prisoner's guilt, a statement which might reasonably be expected to call forth a reply from an innocent person.

Conviction quashed.

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *Solicitor to the Treasury.*

(1) 14 Cox, C. C. 390.

J. F. C.

Considered. In re A DEBTOR (No. 21 OF 1950) [1951] 1 Ch. 313

Applied. Re A DEBTOR (No. 21 OF 1950). [1950] 2 All E.R. 1129.

C. A.
1908
July 3.

[IN THE COURT OF APPEAL.]

In re A DEBTOR, 478 OF 1908.

Bankruptcy—Bankruptcy Notice—Validity—Mistake in Amount of Interest—Formal Defect—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 143, *sub-s.* 1.

A bankruptcy notice required payment of a certain sum as being the balance claimed to be due on a final judgment. In the margin of the notice there was a statement of how the balance was arrived at, namely, debt so much, interest so much, amount credited to debtor so much. It appeared that the interest was wrongly calculated and that the notice claimed 1*l.* 5*s.* 6*d.* in excess of the amount due from the debtor:—

Held, that the mistake in the amount of interest was not a formal defect or irregularity which could be remedied under s. 143 of the Bankruptcy Act, 1883, and that the bankruptcy notice was bad.

In re Bates, (1887) 4 Morr. 192, considered.

APPEAL from a receiving order made by one of the registrars of the Court of Bankruptcy.

On April 3, 1908, the petitioning creditors served on the debtor a bankruptcy notice in the usual form claiming payment of the sum of 984*l.* 7*s.* 1*d.* as being the balance due on a final judgment obtained by the petitioning creditors against the debtor on June 27, 1906. In the margin of the notice there was the following statement of the way in which the balance was arrived at:—

Debt	£1430	14	10
Interest	101	2	4
	1531	17	2
Credit pursuant to order of March 10, 1908	545	8	1
	986	9	1
Further credit pursuant to Master's directions of March 26, 1907	2	2	0
	£984	7	1

It appeared that the interest was wrongly calculated and that the total sum due for interest was 99*l.* 16*s.* 10*d.* instead of

101*l.* 2*s.* 4*d.*, the result being that the petitioning creditors claimed 1*l.* 5*s.* 6*d.* in excess of the amount due to them. The debtor having failed to comply with this notice, a bankruptcy petition was presented against him. The petition was opposed by the debtor on the ground that the bankruptcy notice was invalid.

The registrar overruled the debtor's objection, being of opinion (1.) that this was a case to which the maxim "De minimis non curat lex" applied, and (2.) that it was covered by *In re Bates* (1), which shewed that a mistake of this kind was a mere formal defect within s. 143, sub-s. 1, of the Bankruptcy Act, 1883 (2), and he made a receiving order against him.

The debtor appealed.

Hansell, for the debtor. This bankruptcy notice is bad because it claims a small sum in excess of that which is due under the judgment. That is not a mere formal defect which can be remedied under s. 143 of the Bankruptcy Act, 1883. It must be borne in mind that bankruptcy notices are to be construed with great strictness by reason of the penal consequences which arise therefrom: *In re Collier* (3); *In re O. C. S.* (4) The maxim "De minimis non curat lex" has no application to a case where the bankruptcy notice includes a claim for which there is no foundation. *In re Bates* (1) has never been followed, and it has been distinguished and adversely criticized in *In re Miller, Ex parte Miller.* (5) It was wrongly decided and ought to be overruled. It is also inconsistent in principle with two unreported cases—*In re Beach* (6), a decision of the Court of Appeal, and *In re Threadkell* (7), a decision of the Divisional Court—both of which are directly in point. In *In re Beach* (6) the bankruptcy notice included, in addition to the costs of the

(1) 4 Morr. 192.

(2) Sect. 143, sub-s. 1, provides: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court."

(3) (1891) 8 Morr. 80.

(4) [1904] 2 K. B. 161.

(5) (1893) 10 Morr. 183.

(6) Dec. 5, 1905.

(7) Nov. 10, 1906.

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action, a sum of 2*l.* 15*s.*, the costs of an unsuccessful attempt by the debtor to set aside the judgment on which the notice was founded. In *In re Threadkell* (1) the notice omitted to give credit for a sum of 2*l.* paid off the judgment debt. In both cases it was held that the notice was invalid and that the mistake in the amount due was incapable of being cured by amendment. There is therefore no ground for this receiving order.

[KENNEDY L.J. referred to *In re Johnson.* (2)]

That case does not apply, because there the debtor could ascertain from the notice itself the true amount of the debt.

Whinney, for the petitioning creditors. There is here a mere error of calculation, and no injustice has been done to the debtor. The bankruptcy notice in the margin shews how the balance is arrived at, and the debtor was not embarrassed by it. This is a formal defect within s. 143, sub-s. 1. *In re Beach* (3) is distinguishable because there the additional costs included in the notice were due under a separate order, whereas here the mistake is in something which is accessory to the judgment debt. *In re Bates* (4) is still good law. *In re Miller* (5) itself affirms the principle that a mistake as to amount may be a formal defect, Vaughan Williams J. treating the question as one of degree.

[COZENS-HARDY M.R. The learned judge was not then in a position to overrule *In re Bates* (4), but it is clear that he did not approve of it.]

Sect. 143 was applied in *In re Low* (6) and *In re Wenham.* (7) The registrar was right in treating this as a case in which the maxim "De minimis non curat lex" applies.

COZENS-HARDY M.R. This appeal, though it relates only to a small amount, undoubtedly raises a point of importance. The petitioning creditors obtained a final judgment against the debtor. Certain sums were either paid or allowed by way of set-off so that the amount of the judgment debt was reduced. A bankruptcy notice was served on the debtor, and in the margin

(1) Nov. 10, 1906.
(2) (1883) 25 Ch. D. 112.
(3) Dec. 5, 1905.
(4) 4 Morr. 192.
(5) 10 Morr. 183.
(6) [1895] 1 Q. B. 734.
(7) [1900] 2 Q. B. 698.

of that notice there are inserted certain figures which bring out the result that a sum of 984*l.* 7*s.* 1*d.* is the balance of the amount due on the final judgment. The bankruptcy notice proceeds in the usual form requiring payment and stating that a non-compliance with the bankruptcy notice will involve the consequences, which to some extent are penal consequences, of bankruptcy. The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose I care not what the precise amount of the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said "If you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made bankrupt." It is said that is a formal defect which can be set right under s. 143, sub-s. 1, of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him. It is not necessary to say that there was any attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of s. 143. So much in point of principle. I think, however, that when we consider the authorities, both reported and unreported, to which our attention has been called, the matter has really been decided for us. The first case to which we have been referred is the case of *In re Bates* (1), in which there was a judgment debt for 446*l.* and execution was issued, but the goods were claimed by a third party, and an interpleader order was obtained whereby on payment of 20*l.* into Court by the claimant the sheriff was directed to withdraw, the effect of which was that execution could not have been levied for more than 426*l.* A bankruptcy notice was given requiring payment of the full amount of the debt. There

(1) 4 Morr. 192.

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were other points in the case which I need not refer to. Mathew J. there said: "Then it is further said that the notice claims the whole amount, and it is contended that execution has at any rate been stayed as to 20*l.* But that is in my opinion a formal defect which the Court is bound to correct." I only pause to say that in that case the full amount was due although execution could not have been levied for more than 426*l.* He goes on to say, "No substantial injustice has been caused, and the mistake ought to be remedied." Cave J. says, "Both the objections taken relate in my opinion to mere formal defects, and nothing more; 426*l.* at any rate was unpaid, and the debtor did not pay or give security." That was in 1887. In 1893 the matter again came before a Divisional Court, consisting of Vaughan Williams and Gainsford Bruce JJ., in the case of *In re Miller, Ex parte Miller.* (1) There Vaughan Williams J., discussing *In re Bates* (2), says, "I cannot help saying—and I think I ought to say—that in my opinion the judgment of Mathew J. in *In re Bates, Ex parte Lindsey* (2), goes very far indeed when it says that a mistake of 20*l.* in the notice is a mere formal defect." The Court of Appeal in *In re O. C. S.* (3) explained, not for the first time, the extreme importance of great strictness in dealing with bankruptcy notices. Vaughan Williams L.J., referring to the case of *In re Collier* (4), in which Cave J. had laid down that principle, said: "In that decision I concurred. I have ever since declined to allow an amendment of a bankruptcy notice except in the case of a merely formal defect." Acting on that principle, the Court declined to allow an amendment of the bankruptcy notice, the claim being not for something which was not due, but for two judgment debts in one notice. It was held that the strictness applicable to bankruptcy notices ought to prevail and that the Court ought not to interfere by way of amendment. The matter again came before the Court of Appeal in December, 1905, in *In re Beach*, where there was a mistake in the bankruptcy notice of a sum of 2*l.* 15*s.* Final judgment had been obtained against Beach, and the bankruptcy notice included a sum of 8*l.* 1*s.* for costs. The total costs due under the judgment

(1) 10 Morr. 183.
(2) 4 Morr. 192.
(3) [1904] 2 K. B. 161.
(4) 8 Morr. 80.

were only 5*l.* 6*s.*, but Beach had attempted to set aside the judgment on grounds which are not material for the present purpose. That application was dismissed with costs, which amounted to 2*l.* 15*s.*, and those costs were added to the judgment debt. The Court held that the addition of that 2*l.* 15*s.*, although it was admittedly due from Beach, rendered the bankruptcy notice bad and that it ought not to be amended. We have been furnished with a very short note of the judgment given by Vaughan Williams L.J. allowing the appeal, declining to amend the bankruptcy notice, and saying, in effect, that it was not a formal defect which ought to be remedied under s. 143. We have also been furnished with a note of another judgment on the same subject in the case of *In re Threadkell*, before a Divisional Court consisting of Bigham and A. T. Lawrence JJ., on November 10, 1906, and there the same principle was laid down very strongly. The mistake in that case was the omission to give credit for a sum of 2*l.* off the judgment debt. *In re Bates* (1) was relied on, but the learned judges in the Divisional Court said that this was not a formal defect at all. It was a claim against the debtor of a sum which in fact never was due, and in their opinion that was a defect which could not be remedied. Both on principle and on authority it seems to me that when you find a notice including in the claim for payment a sum which is not due from the debtor at all, that is not a mere formal defect within s. 143, sub-s. 1. The appeal must therefore be allowed.

FARWELL L.J. I am of the same opinion. This is a statutory jurisdiction, and the statute must be strictly followed. Sect. 4, sub-s. 1, of the Bankruptcy Act, 1883, says that a debtor commits an act of bankruptcy if (among other things) (*g*) a creditor obtains a final judgment against him and serves on him a bankruptcy notice requiring him to pay the judgment debt "in accordance with the terms of the judgment" and the debtor fails to comply with such notice. Sect. 143, sub-s. 1, enables the Court to remedy any mere formal defect or irregularity in the notice. I cannot think it is a mere formal defect to include in a

(1) 4 Morr. 192.

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bankruptcy notice not only the amount payable under the judgment, but also a sum which is not due and owing at all, and which the debtor has no means of seeing on the face of the notice is not due and owing. *In re Johnson* (1) was a different case, inasmuch as upon the notice and the schedule combined it was plain that the right amount of the debt could be ascertained, although in the body of the notice the wrong amount was stated. Cotton L.J. there said: "In my opinion the error in the statement of the debt in the present case was simply a 'formal defect,' and I am satisfied that no injustice whatever has been caused to the appellant by it. He had the means of correcting the error and no injustice has been done to him." I take that to mean that on the face of the document read as a whole the debtor could see the mistake for himself, and therefore no injustice was done. In this case there is nothing whatever upon the face of the notice to tell one that the interest has been wrongly calculated and that too much has been asked. The case is on all fours with *In re Threadkell*, and I desire to adopt a passage in Bigham J.'s judgment as my own. He says this: "In this case the creditor had obtained a final judgment against the debtor and had served a bankruptcy notice under the Act, but a notice which required him to pay a sum of 40*s.* in excess of the amount due on the judgment, and in my opinion non-compliance with this notice could never constitute an act of bankruptcy at all. It must be remembered that proceedings under this Act have the most grievous consequences not only for the debtor but for other people"; and then he expresses, as I understand him, his dissent from the judgment of Mathew and Cave JJ. that an excess of 20*l.* could be treated as a formal defect. I also feel great difficulty in following that case. I do not myself see on the wording of the Act that we are entitled to treat as a formal defect a demand for a sum in excess of the judgment when the Legislature says that the bankruptcy notice must be a notice requiring payment in accordance with the terms of the judgment.

KENNEDY L.J. I agree. It seems to me that this case is covered by authority; and if we had to decide this case entirely apart

(1) 25 Ch. D. 112.

from authority I think that this notice ought to be held bad. The only way in which it is suggested that the decision appealed from can be supported is by holding that a misstatement in the bankruptcy notice of the amount due, which on the face of the document there is certainly no opportunity of the debtor seeing to be merely a slip, is either a formal defect or an irregularity within s. 143, sub-s. 1, of the Bankruptcy Act, 1883. To my mind a formal defect, with all respect to the judges who decided *In re Bates* (1), cannot include a misstatement as to the amount upon which the creditor bases his claim; and such a misstatement certainly is not an irregularity. In *In re Johnson* (2), which was a decision under the Bankruptcy Act, 1869, s. 82, which was in substance the same as s. 143, sub-s. 1, it was pointed out that, though it was true that there was in the body of the notice a mistake as to the amount due under the judgment, it was obviously a clerical mistake—24*l.* for 74*l.*—because the notice went on to say "being the sum claimed of you by him according to the particulars annexed," and those particulars correctly stated the amount of the debt. That was a mere clerical error. It was a defect in form and not in substance, and a defect which could not mislead or embarrass the debtor, because he could see on the face of the document what was the nature of the claim and what was the amount which was really claimed from him. In *In re Low* (3) the mistake in the bankruptcy notice was of a different kind, namely, as to the number of the defendants against whom judgment had been recovered, and it was held that, whether you call it an irregularity or a defect, it was a purely formal matter immaterial to the substance of the claim on which the bankruptcy notice was founded, and in no way affecting the rights of the debtor. In my opinion it is clear that this appeal should be allowed.

Appeal allowed.

Solicitors: *Wild & Co.; Stephenson, Harwood & Co.*

(1) 4 Morr. 192. (2) 25 Ch. D. 112.
(3) [1895] 1 Q. B. 734.

H. B H.

C. A.
1908
July 3.

[IN THE COURT OF APPEAL.]

In re A DEBTOR, 484 OF 1908.

Bankruptcy—Bankruptcy Notice—County Court Judgment—Form of Notice—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 105—*County Court Rules*, 1903 *and* 1904, *Order* XXIII., *r.* 2; *Appendix, Form* 151—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1883, 1890, *r.* 136 (1.); *Appendix, Form* 6.

Where a bankruptcy notice is founded on a county court judgment it must require payment of the judgment debt to the registrar of the county court in accordance with the terms of the judgment; and a bankruptcy notice in the ordinary form requiring payment to the creditor is bad. The bankruptcy notice must also contain a statement of the address of the creditor.

APPEAL from one of the registrars of the Court of Bankruptcy.

On October 21, 1907, the petitioning creditor, Lizzie Galt, widow, obtained judgment against the debtor in the Brompton County Court for 104*l.* 15*s.* 2*d.* The judgment, which was in the statutory form, was as follows: "It is this day adjudged that the plaintiff do recover against the defendant the sum of 52*l.* 3*s.* for damages and 52*l.* 12*s.* 2*d.* for costs, amounting together to 104*l.* 15*s.* 2*d.* And it is ordered that the defendant do pay the same to the registrar of the Court on the 16th day of November, 1907."

On March 30, 1908, the petitioning creditor served on the debtor a bankruptcy notice in the usual form requiring payment to her (giving her address) of the sum of 93*l.* 16*s.* 2*d.*, the balance claimed to be due on the judgment. The debtor not having complied with this notice, a bankruptcy petition was presented against him. The debtor opposed on the ground that the notice was bad inasmuch as it did not require payment to the registrar of the county court in accordance with the terms of judgment.

The registrar, following a decision of Mr. Registrar Linklater, dismissed the petition.

The petitioning creditor appealed.

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Hansell, for the petitioning creditor. Sect. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, provides that a bankruptcy notice must allow the debtor three alternative modes of discharging his obligation, namely, by paying the debt or by securing or compounding for it to the satisfaction of the creditor or the Court. These statutory requirements are given effect to in Form 6 in the appendix to the Bankruptcy Rules, and that form gives the address of the creditor. The bankruptcy notice in this case follows the statutory form, but its validity is impeached on the ground that, being a notice founded on a county court judgment, it does not require payment to the registrar of the county court, and the question is, How are the Bankruptcy Acts and Rules to be applied to county court judgments? Form No. 151 in the appendix to the county court rules, which is the statutory form of a judgment in the county court for debt or damages, really consists of two distinct parts—(1.) the judgment, in the proper sense of the word, whereby it is adjudged that the plaintiff do recover, &c., and (2.) an order requiring payment to be made to the registrar of the county court. The County Courts Act, 1888, s. 28, requires that judgments in the county courts shall be entered in the registrar's book and prescribes the mode of proving a county court judgment, which is by obtaining a certified copy of the entry in the book. That is the true judgment of the Court—the judgment which the judge has pronounced between the plaintiff and the defendant—and that is the judgment upon which the petitioning creditor is proceeding. Then s. 105 prescribes the mode of paying the moneys due under the judgment and says that there must be payment into Court.

[FARWELL L.J. How can it be said that this bankruptcy notice is a notice requiring payment according to the terms of the judgment within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883?]

If a debtor on whom a bankruptcy notice was served paid the creditor, and that was accepted, he would have completely discharged his obligation, and that is said to be the usual practice. Seeing that the County Courts Act was passed in 1888, it is remarkable that this point has only been taken quite recently for

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the first time. The authorities lay stress upon the importance of a bankruptcy notice containing the address of the creditor: *In re Stogdon* (1); *In re Beauchamp* (2); and the statutory form of notice requires payment "to C. D. of" so and so. If, instead of that, the proper form of notice when founded on a county court judgment is that it should require payment to the registrar, the debtor will be deprived of two of the three alternative methods of discharging his obligation under the notice, namely, securing or compounding for the debt to the satisfaction of the creditor, for the notice will contain no statement of the creditor's address and the debtor will not know where to find him.

[KENNEDY L.J. The statute says "to the satisfaction of the creditor or the Court."]

It would be practically impossible to obtain the opinion of the Court within the time allowed by the statute for complying with the notice, and such a thing has never been heard of in fact. Except upon the construction of the County Courts Act above contended for, there is an irreconcilable conflict of jurisdiction between that Act and the Bankruptcy Act. This, therefore, is a good bankruptcy notice, and a receiving order ought to have been made upon it.

Tindale Davis, for the debtor.

COZENS-HARDY M.R. I think that this is a very plain case, and that the registrar was perfectly right in the conclusion he came to, following as he did a decision in a precisely similar case of Mr. Registrar Linklater. The bankruptcy provision applicable is contained in s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, which provides that the bankruptcy notice served on the debtor must be a notice "requiring him to pay the judgment debt in accordance with the terms of the judgment." The judgment in this case was obtained in the county court, and it was obtained in a form which is absolutely obligatory, because s. 105 of the County Courts Act, 1888, is conclusive. That section deals with judgments for debt or damages and provides for the payment of the amount of the judgment in certain cases by instalments, and then it goes on to say "and all such moneys, whether payable in

(1) [1895] 2 Q. B. 534. (2) [1904] 1 K. B. 572.

one sum or by instalments, shall be paid into Court." The judgment, which was dated October 21, 1907, was drawn up in the form given in the appendix to the County Court Rules and was as follows: "It is this day adjudged that the plaintiff do recover against the defendant the sum of 104*l.* 15*s.* 2*d.*, and it is ordered that the defendant do pay the same to the registrar of the Court on the 16th day of November, 1907."

In the present case the bankruptcy notice was given in accordance with Form No. 6 in the appendix to the Bankruptcy Rules and required payment to the petitioning creditor. The appellant contends that that is a good notice. The answer is that that is not a notice requiring the debtor to pay in accordance with the terms of the judgment according to s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, and when that has been said all that is necessary to be said has been said. It is suggested that it is important that the address of the creditor should be given in the notice. I agree. There is no reason whatever why the address of the creditor should not be given, and I think it ought to be given in order that the debtor, if he is minded to secure or compound the debt to the satisfaction of the creditor, may know where to find him. I see no difficulty whatever in holding that Form No. 6 is not an absolutely hard and fast form which must be followed in every case, because r. 136 (1.) says that "a bankruptcy notice shall be in the Form No. 6 with such variations as circumstances may require."

Nothing would be easier than to modify the form in the case of a bankruptcy notice founded on a county court judgment by requiring the judgment debt to be paid to the registrar of the Court according to the terms of the county court judgment, and giving either on the front or on the back of the notice the address of the creditor. Then it seems to me that all the provisions of the statute would be sufficiently complied with. I do not recognize any inconsistency between the Bankruptcy Act, 1883, and the County Courts Act, 1888, although it is no doubt true that when the bankruptcy forms were settled no form was expressly framed to meet the case of a county court judgment. There is no difficulty in settling such a form. There is nothing in the Act which entitles the creditor to give a notice in such a

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case in a form requiring the debtor to pay to the creditor. The appeal must be dismissed.

FARWELL L.J. I agree; I have nothing to add.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitors: *Tippetts; Poole & Robinson.*

H. B. H.

Overruled. HILL *v.* WILLIAM HILL (PARK LANE) LD. [1949] A. C. 530

Overruled. HILL *v.* WILLIAM HILL (PARK LANE), LTD. [1949] 2 All E.R. 452.

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[IN THE COURT OF APPEAL.]

HYAMS *v.* STUART KING (A FIRM).

Gaming—Cause of Action—Cheque given for Racing Bets—Forbearance to publish Default—New Consideration—Gaming Act, 1710 (9 *Anne*, *c.* 14); *Gaming Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 41), *s.* 1; *Gaming Act*, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18—*Amendment of Pleadings at Trial.*

The plaintiff and defendant, who were both bookmakers, had betting transactions together, which resulted in the defendant giving the plaintiff a cheque for the amount of bets lost to him. At the request of the defendant the cheque was held over by the plaintiff for a time, and part of the amount of the cheque was paid by the defendant. Subsequently a fresh verbal agreement was come to between the parties, by which, in consideration of the plaintiff holding over the cheque for a further time and refraining from declaring the defendant a defaulter and thereby injuring him with his customers, the defendant promised to pay the balance owing in a few days. The balance was never paid:—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constituted a good consideration for the fresh agreement, and that the plaintiff was entitled to recover.

The writ in the action was indorsed with a statement of claim upon an account stated, but at the trial the plaintiff set up, and recovered upon, the fresh agreement; no formal amendment of the statement of claim was made at the trial, but all necessary amendments were taken as having been made:—

Held, that in all cases where the plaintiff seeks to recover at the trial upon a different cause of action from that appearing in the pleadings, a formal amendment of the pleadings should be made by the judge.

APPEAL of the defendant Maughan from a judgment of Darling J.

The following statement of facts is taken from the written judgment of Sir Gorell Barnes, President.

The plaintiff was a bookmaker, and had transactions with a firm carrying on business under the name of Stuart King, in which the defendant Thomas Maughan was a partner. In the months of October and November, 1907, certain betting transactions had taken place between the plaintiff and the defendant firm which resulted in a balance of 108*l.* 10*s.* claimed by the plaintiff, and on November 4 a cheque was given to the plaintiff, in respect of the said balance, signed both in the name of the firm and by the defendant. On November 5 the plaintiff was requested by a member of the firm not to present the cheque, as money which had been expected had not arrived; the request made to the plaintiff was to hold the cheque over for a few days and keep it quiet. The plaintiff did so, and a few days later Maughan requested the plaintiff to hold it over as, if he told other customers of the firm, it would ruin the firm. The plaintiff accordingly held the cheque over, and on November 11 he received a cheque on account for 25*l.* signed by Maughan and the other partner. The plaintiff afterwards said that he wanted the balance, and would take proceedings, but a further request, substantially to the same effect, was again made by Maughan, and a letter was written by the defendant to the plaintiff enclosing another cheque for 25*l.* on account, and promising to send the balance on the following Monday. Afterwards the following letters passed. On December 2, 1907, the plaintiff wrote to the defendant: "Dear Sir,—You promised faithfully that, if I kept quiet and did not injure your business by telling any of the s.p. men, or take proceedings, you would pay every farthing that was owing; now, after agreeing to your response, this is how you are treating me, with contempt, for every time I have rang you up and you heard my voice you drop the receiver, and as you do not intend to settle after all the consideration I have shewn you like a good sportsman, I have decided to place this in the hands of my solicitors for collection without I have a favourable reply, there will be no other alternative; but I trust you will prevent this, because you will be the first man I have taken to Court since I have been in business, over twenty-one years. Amicable

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settlement preferred. Yours faithfully, (signed) H. Hyams." To this letter the defendant replied as follows: "Dear Harry,—Don't take steps, as you will be paid if you wait a few days longer. Yours, (signed) S.K." But no further money was paid by the firm, or by Maughan, and on December 27 the plaintiff issued the writ against the firm, by the indorsement on which he claimed 48*l.* 10*s.* balance due to him by the defendant firm on an account stated. The amount was arrived at by debiting the firm with 108*l.* 10*s.* and crediting the aforesaid two sums of 25*l.*, and credit was also given for a sum of 10*l.*, making, therefore, the balance of 48*l.* 10*s.* On January 16, 1908, the plaintiff obtained judgment by default against the firm for the said sum of 48*l.* and costs, but afterwards Maughan applied that the judgment should be set aside and that he should be at liberty to defend the action on the ground that he did not hear of the proceedings until application was made for leave to issue execution against him, and on March 14 an order was made by the Master setting aside the judgment, and giving Maughan liberty to defend the action. The case came on before the learned judge on March 20, when he gave judgment for the plaintiff, with costs. There were no pleadings in the case other than the indorsement on the writ, and the learned judge gave liberty to amend, but no formal amendment was made. He held that the action was not brought on the cheque, but that there was a promise made for some other consideration than that of losing the bets—that is to say, that the cheque had been held over at the request of the defendants and that the plaintiff had given consideration by agreeing not to mention, and in fact not mentioning, the matter to other customers of the firm.

Ritter (*Edmondson* with him), for the defendant Maughan. The action was in substance, though not in form, brought upon the cheque given by the defendant in payment of the bet, and it is clear upon the authorities that the cheque was given for an illegal consideration and that the plaintiff could not recover upon it. In form no doubt the plaintiff's claim was upon an account stated; but even that does not help the plaintiff, for the account

stated must be based upon the cheque itself, and then the action is obviously one to recover the balance of a bet. The new agreement set up by the plaintiff at the trial was not made in fact, and, even if some agreement is to be taken to have been arrived at, there was no valid consideration for it. Upon the authorities there is, in the absence of a threat to take a step to the detriment of the loser who does not pay his gambling debt, no consideration for a new contract to pay the amount: *Chapman* v. *Franklin* (1); and it is not a proper inference from the evidence and the correspondence that the plaintiff ever threatened to expose the defendant to his sporting associates and friends. The strongest inference of fact against the defendant that the circumstances warrant is that the plaintiff gave him time for payment of the balance due, but the mere giving of time for payment of a debt which is itself irrecoverable cannot be a good consideration for a fresh promise to pay it. [He also cited *Bubb* v. *Yelverton* (2); *Tatam* v. *Reeve* (3); *Woolf* v. *Hamilton* (4); *Goodson* v. *Baker* (5); *Goodson* v. *Grierson.* (6)]

Cautley, for the plaintiff. It is true that the statement of claim, which was indorsed on the writ, was upon an account stated, but the action, which was a short cause under Order XIV., was in fact tried upon a fresh agreement with a new consideration; and although, in the absence of pleadings other than the indorsement on the writ, there was no formal amendment, all necessary amendments were taken as having been made. The new consideration was that the plaintiff would not publish to the rest of the world the defendant's refusal to pay his debt; it is good in law, and the agreement for which it was the consideration was concluded in fact between the parties. Even if a mere forbearance to sue would be insufficient, an advantage to one party and a disadvantage to the other, such as existed in the present case, is a good consideration for a new agreement, and the Court will not have regard to questions as to the quantum of the consideration. The defendant's new promise was given to avoid the consequences of

(1) (1905) 21 Times L. R. 515.
(2) (1870) L. R. 9 Eq. 471.
(3) [1893] 1 Q. B. 44.
(4) [1898] 2 Q. B. 337.
(5) (1908) 98 L. T. 415.
(6) [1908] 1 K. B. 761.

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not having paid his racing debt. [He also cited *In re Browne, Ex parte Martingell.* (1)]

Ritter in reply.

Cur. adv. vult.

May 28. SIR GORELL BARNES, PRESIDENT, read the following judgment:—This is an appeal from a judgment of Darling J., delivered on March 20 last, after a trial in Middlesex without a jury, whereby the plaintiff was held entitled to recover from the defendant 48*l.* 10*s.* and costs. The questions raised are of considerable interest and importance. The facts which give rise to these questions are very short, and appear from the evidence to be as follows: [After setting out the facts as above, his Lordship proceeded:—] The decision thus given was based upon certain cases which I shall have to refer to later on. No point appears to have been raised or argued as to there being any difference in the case if the action had been one on a promise by an individual instead of by a firm, nor was any such point made on the appeal. It is clear that the action could not have been brought on the cheque, which was given for an illegal consideration, and it was not suggested that it could be maintained on an account stated between the parties, and therefore, in order to recover, the plaintiff had to rely upon some cause of action other than the two which I have just mentioned. I think it important to observe in this case that considerable difficulty has arisen through the plaintiff not formulating his cause of action by alleging the contract on which he relied, and the consideration for it. From the cases which have been before this Court lately there would seem to be a tendency to a certain looseness of practice by counsel with regard to amendments made in the course of trials which not only places the judges who try the cases, but also the Court of Appeal, in case an appeal comes before it, in a difficult position, and I think it extremely important, at any rate in cases where the point turns on the exact form of the action or the exact defence, that the plaintiff or defendant, as the case may be, seeking to amend, should be required to put his proposed amendment down in writing and hand it up to the judge so that there can be no

(1) [1904] 2 K. B. 133.

misapprehension as to what is the real question intended to be raised. If this is not done it may prove extremely difficult to be at all certain what the precise issue raised is and to have the case conducted in a definite and clear manner. The result has been in the present case that in the course of the case an endeavour has been made to formulate some form of action which is supportable, and although the plaintiff's counsel has indicated broadly what his point is, it seems to me, having regard to certain of the authorities to which I shall refer, essential that the cause of action relied upon should have been stated with precision.

The contention of the plaintiff was that he could shew on the facts above stated a cause of action entirely independent of the cheque and bet, that is to say, one of a promise for good and fresh consideration to pay the balance claimed by him, whereas the defendant contended that the bets, being in respect of gaming transactions, were void; that the cheque was given for an illegal consideration, and that no independent good consideration could be shewn which would support an action on a promise to pay the plaintiff his claim. Now, according to my view, the result of the case depends upon what is the true contract to be gathered from the circumstances which were stated in evidence, and upon the law applicable to such a contract. It is clear that the original bets, which were wagers on horse racing, were void under the statute 8 & 9 Vict. c. 109, s. 18, and that the cheque must, by the operation of the statute 9 Anne, c. 14 (which was held in *Goodburn* v. *Marley* (1) and in other cases, the last of them being *Woolf* v. *Hamilton* (2), to apply to horse racing), and the statute 5 & 6 Will. 4, c. 41, s. 1, be deemed and taken to have been made and given for an illegal consideration, and the decision, as it at present stands, is based upon the view that there is a new contract, not tainted with the illegality which affects the cheque, but founded upon independently good consideration.

The arguments on the appeal were based upon certain authorities which were cited, but the case, in my opinion, requires consideration on broader lines than the mere examination

(1) (1742) 2 Stra. 1159. (2) [1898] 2 Q. B. 337.

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of those cases. I will, however, refer first to these decisions. The earliest was *Bubb* v. *Yelverton* (1), in which a bond had been given to persons to whom the obligor had lost bets on horse racing which he was unable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss. It was held by Lord Romilly M.R. that the bond was a good bond, and in the course of his judgment he said: "I do not mean to express any opinion, whatever I may think upon the subject, whether, if a person incurs debts in racing, and gives a bond for payment of them, the bond can be proved against his estate. But here there was a perfectly good consideration quite ulterior to and independent of any racing debt. It is impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them." It was pointed out in the course of the argument in that case that the wagering contracts were not illegal, but void. The difference between bonds and bills or notes was noticed, in that a bond given merely to pay a lost wager was only voluntary, and therefore without consideration, but a cheque in payment of such a wager would be deemed to have been made and given for an illegal consideration, and therefore void except in the hands of a bona fide holder for value without notice.

In the case of *In re Browne, Ex parte Martingell* (2), Buckley J. followed that decision. There an action brought to recover a gaming debt had been dismissed, and the creditor wrote to the debtor's club complaining of his conduct in not paying debts of honour. The debtor, in consideration of this letter of complaint being withdrawn, gave the creditor bills in satisfaction of his debt. Before the bills were paid the debtor became bankrupt. On the facts of that case Buckley J. held that the question of the existence of any debt was in the circumstances entirely at an end; he said: "The bills were given for an altogether new consideration, which was not an illegal consideration. They were given, not to pay the gaming debt, but, as Romilly M.R. said in

(1) L. R. 9 Eq. 471. (2) [1904] 2 K. B. 133.

Bubb v. *Yelverton* (1), to avoid the consequences of not having paid it."

In the case of *Chapman* v. *Franklin* (2) the defendant had offered to pay amounts which he had lost in respect of bets on horse races, after the expiration of an extended time, and the offer was accepted; but it was held that there was no consideration for the promise to pay, as there was no evidence of any forbearance at the debtor's request to do anything to the detriment of the debtor, and therefore the action would not lie, but it would seem from the report that both Lord Alverstone C.J. and Kennedy J. thought that an agreement to exercise forbearance not merely to sue, but to forbear doing something else to the detriment of the debtor, would have amounted to good consideration.

In *Goodson* v. *Baker* (3) the last case was distinguished. In that case the defendant, a bookmaker, owed the plaintiff, also a bookmaker, 375*l.* for money lost on bets. The defendant admitted that he owed the plaintiff 355*l.*, and asked him to accept a post-dated cheque for that amount in settlement. The plaintiff agreed to this, and the defendant sent him his cheque for that amount post-dated fourteen days. The cheque was dishonoured. The defendant then asked for further time, which was given, but the defendant did not pay, and the plaintiff, about seven weeks after the dishonour, brought an action on the cheque. The defendant was a member of a club frequented by sporting men, at which he might have been posted as a defaulter if he had failed to pay his betting debts. A. T. Lawrence J. in that case held that there was sufficient consideration to support the action, because of the fact, which he held established by the evidence, that the defendant gave the cheque and asked for time in order to avoid being declared a defaulter in respect of the full claim of 375*l.*, and he allowed an amendment to the writ by adding a claim founded upon the contract, which he thus supported. I notice that, on the evidence as reported, there was nothing to shew anything more than an agreement not to sue for a time. There may have been a fear on the part of the

(1) L. R. 9 Eq. 471. (2) 21 Times L. R. 515.
(3) 98 L. T. 415.

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defendant that if he did not pay he might be declared a defaulter; but I find no evidence of any agreement between the parties that the plaintiff would not declare the defendant a defaulter, and unless there was such an agreement there would be no consideration to support the alleged promise, and the decision could not be supported.

The last case cited was the case of *Goodson* v. *Grierson* (1), in which the only question raised was whether the Court would dismiss an action by a bookmaker, which the defendant alleged in his defence was in respect of betting transactions, on the ground that it was frivolous, Fletcher Moulton L.J. stating that he did not express any opinion on the point whether forbearance to sue for a gaming debt might be a good consideration, and adding that he thought that the action was not at a stage at which the Court was in full possession of the facts, and it could not be said that there might not be good consideration on the decided cases to support the account stated.

These cases, so far as they go, support the plaintiff's case, for, although they differ in details, there is the broad point running through them that while the plaintiff cannot sue for the recovery of money won by him by betting, nor on a bond, bill, note, or cheque given to pay the money lost, he can sue upon a new contract, not tainted with illegality and made for good consideration, if he can prove such a contract. I think that there was, on the evidence in this case, a new contract in fact, and that the true contract to be gathered from that evidence was that in consideration that the plaintiff would give the defendants a reasonable time within which to pay the amount which the defendants ought to have paid him on November 4, and would forbear to declare them defaulters if they paid within that further time, they would pay him on or before the expiration of that time the amount which both parties considered was due to the plaintiff in honour, though not by law; and the defendants, in fact, acted upon the contract by paying the two sums of 25*l.* each on account, and the plaintiff exercised the agreed forbearance, so that the defendants' promise was to pay to the plaintiff at a later date a certain sum of money in order to avoid the consequences of not having paid

(1) [1908] 1 K. B. 761.

the racing debts. No point was made by the defendant Maughan as to the time when the promise should have been performed, and, although the evidence as to this was somewhat vague, it seems to have been taken to have been some reasonable time which had expired before the writ was issued.

The real questions would therefore appear to be: (1.) Whether the new contract was itself one which falls within the provisions of 8 & 9 Vict. c. 109, s. 18; (2.) whether there was any illegality affecting that contract; and (3.) whether that contract was a lawful contract founded on good consideration. Now, with regard to the first question, it may be said that, as the statute just mentioned provides that gaming and wagering contracts and agreements shall be void and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, the contract which it is now sought to maintain was within these provisions; but when the nature of the contract, as I have stated it, is considered, the contract does not, in my opinion, fall within the language nor the meaning of the statute. In the case of *Bubb* v. *Yelverton* (1) the point that the case was within the provisions of the Act was made, but not upheld. There have also been several decisions which in effect tend to support the view that I have just expressed. One of them is the well-known case of *Read* v. *Anderson* (2), affirmed on appeal by the majority of the Court (3), where it was held that the employment of an agent to make a bet in his own name on behalf of his principal might imply authority to pay the bet if lost, and on the making of the bet that authority might become irrevocable. The agent in that case was not legally liable to pay the bet. Hawkins J. in the course of his judgment said (4): "The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act, which in the ordinary course of things will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to

(1) L. R. 9 Eq. 471.
(2) (1882) 10 Q. B. D. 100.
(3) (1884) 13 Q. B. D. 779.
(4) 10 Q. B. D. 100, at p. 108.

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indemnify his agent is implied by law: see Story on Agency, ss. 337-340, and I think it signifies nothing that such obligation is not enforceable in a Court of Justice, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent, for he is not bound to submit to these things for his employer if, by doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can in the case of bets lost, by paying them; and he is not bound in my opinion to incur the odium and consequences of repudiating his honourable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet there was a tacit agreement on the part of the defendant to indemnify him against all the ordinary consequences of his so doing." And Lord Bowen expressed himself thus (1): "I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognized by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken. There is a great deal of apparent difficulty in this case, because the action relates to betting and wagering; but the contract sued on by the plaintiff is not a wagering contract."

I wish also to refer to the cases of *Beeston* v. *Beeston* (2) and *Bridger* v. *Savage*. (3) In the latter case Lord Esher M.R. in the course of his judgment said "it has been held by the Courts on several occasions that the statute applies only to the original contract made between the persons betting." He was not, of course, there referring to that part of the statute which deals with the case of a stakeholder. I do not know what cases Lord Esher had in mind, but the dictum shews what he thought himself. The cases of *Read* v. *Anderson* (4) and the others to which I have just referred were decided before the Gaming Act, 1892, came into operation, but, as that statute does not in my opinion apply to the present case, the reasoning which is to be found in these cases has a distinct bearing upon the consideration

(1) 13 Q. B. D. 779, at p. 783.
(2) (1875) 1 Ex. D. 13.
(3) (1885) 15 Q. B. D. 363.
(4) 10 Q. B. D. 100; 13 Q. B. D. 779.

of the way in which the contract in the present case should be regarded.

Coming, then, to the second question, it is to be observed that there was nothing illegal in the strict sense in making the bets. They were merely void under 8 & 9 Vict. c. 109, and there would have been no illegality in paying them. There is no doubt whatever about this. There was also nothing illegal in giving the cheque, nor would there have been any illegality in paying it, though the defendants could not have been compelled by the plaintiff to pay it, because by statute it was to be deemed and taken to have been made and given for an illegal consideration, and therefore void in the hands of the plaintiff. If the money had been paid, the defendants could not have recovered it: *Thistlewood* v. *Cracroft*. (1) The statutes do not make the giving or paying of the cheque illegal, and impose no penalty for so doing. Their effect and intention appear only, so far as material, to be that gaming or wagering contracts cannot be enforced in a Court of Law or Equity, and that securities as mentioned in the aforesaid statute of 5 & 6 Will. 4, c. 41, which include cheques, are to be deemed and taken to be made and given for an illegal consideration, the effect of which is that they are unenforceable except by a bona fide holder for value without notice. They are not enforceable by legal proceedings. The position, therefore, on November 5 was that the plaintiff had no right of action against the defendant firm, who were merely bound in honour by the conventional code of betting men to meet their betting engagements.

I am unable to see how a new contract such as that suggested, if made for good consideration, can be said to be illegal. I think it would probably have been different if the bets were illegal and the giving of the cheque was an illegal act, for the principles then to be applied would be those succinctly stated in the case of *Attorney-General* v. *Hollingworth* (2) by Baron Watson as follows: "The rule laid down in the case of *Simpson* v. *Bloss* (3) is that, when a demand connected with an illegal transaction can be sued on without the necessity of having recourse to the illegal

(1) (1813) 1 M. & S. 500.
(2) (1857) 2 H. & N. 416, at p. 423.
(3) (1816) 7 Taunt. 246.

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transaction, the plaintiff can maintain an action; but wherever it is necessary to resort to the illegal transaction to make out a case upon the new security, the new security cannot be enforced." But those principles do not strictly apply to a case where nothing prohibited has been done by the parties and the cheque and the bets are merely unenforceable by the plaintiff.

But, thirdly, it may be said that those considerations do not completely dispose of the case, and that a contract, though not positively prohibited, may be unlawful either because it is immoral—that is to say, contrary to positive morality recognized as such by law—or because it is against public policy, and that in such cases there is not a lawful contract founded on good consideration. It is upon this that I have felt some difficulty, for it may be said that the Courts ought not to permit of a claim being made founded on the forbearance aforesaid, because by so doing a means may be afforded of evading the strict provisions of the Acts against gaming and wagering, and of allowing pressure to be brought to bear upon persons failing to pay that which they are under absolutely no legal obligation to pay, and that to support such an action as this will prove generally mischievous; but if there be no illegality nor unlawfulness in the contract and there be good consideration, I cannot see on what grounds it can be suggested that the Courts could refuse to give effect to it.

Now the promise, as already stated, was made in consideration that the plaintiff should not for a time proceed to endeavour to enforce his claim, and should not, if the defendants paid the amount thereof within the agreed time, take any steps to inform the defendant's customers and others of the defendant's failure to meet his void engagements, because, if the plaintiff did so, it would injure the defendant's betting business. The mere giving of time to pay that which cannot be enforced does not amount to consideration; but, apart from questions of illegality and unlawfulness, the second part of the alleged consideration moving from the plaintiff would be within the ordinary definition of good consideration sufficient to ground an action; and indeed in this case it is obvious that the parties regarded the consideration as of the utmost importance, and it probably would be so considered in any case of the kind. I have already said that the contract is not

illegal in the strict sense either as containing an illegal promise or as founded on an illegal consideration, but "a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it": per Lord Bramwell in *Cowan* v. *Milbourn* (1); or, stated more fully, there are matters which the law does not positively prohibit nor forbid in the sense of attaching forfeiture or penalties to them, but which may violate established rules of decency or morals, or be against public policy, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as ground of any legal rights: see Pollock on Contracts, 2nd ed. p. 274.

Wagers which were not against morality, decency, or sound policy were in olden days allowed as the foundation of actions at common law, probably without sufficient anticipation of the results which might follow, and later on attempts appear to have been made in particular cases to find reasons for refusing to enforce them which, when the general principle of validity was assumed, were not of a very sound character. The comments which Lord Campbell made on these attempts will be found in the judgment delivered by him in a case before the Privy Council, *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull* (2), to which the statute 8 & 9 Vict. c. 109 did not apply, and where it is to be noticed that he expressed his regret that "we are bound to consider the common law of England to be, that an action may be maintained on a wager."

But although certain statutes have been passed to which I have already referred, and others—for instance, the Betting Act, 1853 (16 & 17 Vict. c. 119), the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), the Gaming Act, 1892 (55 & 56 Vict. c. 9), and the Street Betting Act, 1906 (6 Edw. 7, c. 43)—there is no statute declaring bets, such as those made by the defendant, or the giving of a cheque in payment of them, illegal. The effect of the statutes applicable to this case is to make gaming and wagering contracts void, and securities therefor in some cases void, and in others to be treated as for illegal considerations and therefore

(1) (1867) L. R. 2 Ex. 230, at p. 236.

(2) (1848) 6 Moo. P. C. 300, at p. 310.

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void, but the Legislature has not gone so far as to prohibit them or (except in certain cases specially dealt with by statute, which it was not suggested applied to this case) to prevent information being published and circulated which enables bets such as those in question to be made. Considering, therefore, that the Legislature has not at present thought fit to deal with such matters further than it has done, and that by a conventional code, not merely accepted by professional betting men, but, as is matter of common knowledge, by a section of the community, how large it is impossible to say, losses by betting are regarded as debts of honour, and winners of bets thought to be justified in taking such fair steps as they can and in using conventional sanctions to enforce payment of them as being debts of honourable, though imperfect, obligation, I feel great difficulty in coming to the conclusion that we ought to lay down as a matter of law that such a contract as that in question is unlawful.

It is necessary to avoid confusion between judicial and legislative functions, and, although there have been cases from which it would seem as if an almost unlimited right had been claimed by the Courts of deciding cases according to the judges' views of public policy for the time being, there is now more precision in dealing with questions of public policy. The doctrine by which contracts are held void as being against public policy must be applied with caution, and care must be taken not to lay down new principles of public policy without sufficient warrant. I will only refer here to Lord Bramwell's judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), where he says: "The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. 'Public policy,' said Burrough J. (I believe quoting Hobart C.J.), 'is an unruly horse and dangerous to ride.' I quote also another distinguished judge (more modern), Cave J., 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters

(1) [1892] A. C. 25, at p. 46.

of the law than as expounders of what is called public policy.' (1) I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?"

Now with the broad facts in mind that at common law wagering contracts as above stated were valid, that the Legislature has not declared that such betting contracts as those which gave rise to this case are illegal, that the contract in question is valid at common law and not prohibited by statute, that the conventional code to which I have referred exists, that the case of *Bubb* v. *Yelverton* (2) was decided nearly forty years ago, and has been followed, I am of opinion that, however much it may be regretted that the assistance of a Court of law is invoked to enforce this contract, we should be embarking upon a doubtful course and going beyond what the Legislature has hitherto attempted to declare, whatever it may do in the future, if we were to hold this contract to be unlawful. To do so would, in my opinion, be legislating, and not declaring the law as it at present exists, and would be taking a considerable step ahead of the policy of the Legislature, which, although it has dealt with the subject of gaming and wagering from time to time for more than two centuries, has never dealt with it in such terms as to make the contract in question either illegal or unlawful. It is for the Legislature to make further amendments of the law relating to this subject, if it should think fit to do so. In my judgment the appeal should be dismissed, but as very great difficulty in dealing with it has arisen from the fact that no amended claim was framed by the plaintiff, I think there should be no costs of the appeal.

FLETCHER MOULTON L.J. read the following judgment:—The extraordinary shape in which the appeal in this case comes before us raises the whole question of the legal status of gaming debts and cheques given in respect of them, and therefore I

(1) See *In re Mirams*, [1891] 1 Q. B. 594. (2) L. R. 9 Eq. 471.

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propose briefly to examine the English law as to these matters before applying it to the facts of this case.

By common law wagers were not illegal, and the nature of a wager is such that from the point of view of jurisprudence there is ample consideration for a valid contract. The distinction which English law makes between wagering contracts and others is therefore entirely the creation of statute. For the last two hundred years at least the Legislature, in view of the moral evil which the prevalence of wagering contracts would bring about, has passed laws to discourage them. The general scheme of this legislation has been to remove such contracts from the protection of the law and to nullify any obligations that could arise under them. But, though the aim of these laws has been fairly constant throughout this long period, the special remedies which the Legislature has selected to combat the evil have varied considerably. Sometimes the provisions have been so drastic as to injure others than the parties to the original transaction, as for instance in the case of 9 Anne, c. 14, which made cheques given wholly or partly in payment of bets upon games absolutely void, so that innocent holders for value found themselves unable to enforce payment, although they were entirely innocent of the gaming transaction and ignorant of the consideration for which the cheque was given. Such blunders have, however, been corrected by subsequent Acts, and now the statutes against wagering form a fairly homogeneous whole, although not wholly free from the defects of piecemeal legislation.

The most important and comprehensive statutory enactment to discourage wagering contracts is to be found in s. 18 of the Gaming Act, 1845. So far as is relevant to the present case that section reads as follows: "All contracts or agreements whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." In my opinion too little attention has been paid to the distinction between the two parts of this enactment, and the second part

has been treated as being in effect merely a repetition of the first part. I cannot accept such an interpretation. So far as the actual wagering contract is concerned, the earlier provision is ample. It makes that contract absolutely void, and it would be idle to enact in addition that no suit should be brought upon a contract that had thus been rendered void by statute. The language of the later provision is in my opinion much wider. It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any way limiting the application of the provision to the wagering contract itself. In other words, it provides that wherever the obligation under a contract is or includes the payment of money won upon a wager, the Courts shall not be used to enforce the performance of that part of the obligation. So much appears to me to be clear from the language used, and we need not in the present case trouble ourselves with any further question as to the effect of such a provision upon the rest of the contract, i.e., whether in such a contract any other portion of the obligation could or could not be enforced. The framers of the statute seem to me to have had in mind the very case that has come before the Courts of first instance in some of the decisions to which we have been referred, where an action has been brought, not upon the original wagering contract, but upon an alleged new contract to pay the sum won on the wager, such contract being based on an alleged further consideration. To prevent such a device succeeding, the statute is made to forbid actions being brought on such contracts by reason of the fact that their object is to recover a sum of money alleged to be won upon a wager. And without such further provision the earlier provision would practically have been of no avail. Seeing that the law does not regard adequacy of consideration, bets could have readily been made recoverable by turning them into contracts enforceable at law without substantially changing their nature. "I will give you a tip for the next race if you will promise to pay the bet you have lost" would otherwise, if accepted, suffice to create a legal debt enforceable in the Courts, and (so far as I can see) good even against creditors. One cannot read the Gaming Act, 1845, without perceiving that it

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was a very serious attempt on the part of the Legislature to put down wagering, and I decline to think that such an obvious and fatal blot was permitted to exist in it, which would well-nigh neutralize its practical effect, when I find language used which is perfectly apt to meet the case, and which to my mind can fairly bear no other interpretation than that which would thus render it effective.

Long prior to this simple and direct enactment relating to wagers generally, the Legislature had taken steps to repress that form of wagering which is more generally known as gaming. It is not necessary to examine the provisions of the numerous Acts which relate directly to the non-recoverability of moneys won at such games, because the provisions of the Gaming Act, 1845, sufficiently deal with the matter. But these earlier Acts are important, in that many of their provisions are directed against securities given for moneys lost in gaming. It would have been idle to provide that the moneys won at gaming could not be sued for if a cheque given for them gave a valid cause of action. Hence, as early as in 1710 the statute 9 Anne, c. 14, provided, amongst other things, that bills (a word which includes cheques) given by any person where the whole or any part of the consideration shall be for money won at gaming shall be utterly void. This was amended by the Gaming Act, 1835, which enacted that such cheques, instead of being void, should be deemed to have been given for an illegal consideration. This amendment of the law protected innocent holders for value, while it left the parties to the transaction and any holder taking such a cheque with notice of the nature of the original consideration in the same position as they had been under the statute of Anne. On the language of this later statute the Court held in *Applegarth* v. *Colley* (1) that the Legislature had thereby rendered the consideration for the cheque an illegal consideration. I agree that this is the effect so far as any proceeding based upon the cheque is concerned, but otherwise I adhere to the opinion I expressed in *Moulis* v. *Owen* (2), that the Act intended to deal only with the security, and that by enacting that it should be deemed to have been given for an illegal

(1) (1842) 10 M. & W. 723. (2) [1907] 1 K. B. 746.

consideration it meant only to secure that it should be invalid under the same circumstances in which it would have been invalid had it been given for an illegal consideration. It was intended to prevent the winner of a bet from bettering his position in any way by taking a cheque for the amount and using that cheque as the basis of a new claim, and this it fully accomplished. Horse racing is not expressly referred to either in the statute of Anne or in the Gaming Act, 1835; but by a series of decisions, culminating in the decision of this Court in *Woolf* v. *Hamilton* (1), it has been settled that horse racing is within these statutes, and that a cheque given for a bet upon a horse race is therefore to be deemed to have been given for an illegal consideration.

The last step which the Legislature has taken towards assimilating the obligation of paying a bet to a turpis causa is by the Act of 1892, which nullifies any promise to pay any person any sum of money paid by him under or in respect of any contract rendered void by the Gaming Act, 1845. It was under this statute that the case of *Tatam* v. *Reeve* (2) was decided, which has since been approved by this Court in the case of *Saffery* v. *Mayer*. (3) But such approval does not include any acceptance of the dictum of Wills J. that the statute applies to a payment made by a person who has no knowledge that it is intended by his principal to be in respect of a gaming transaction. In my opinion the words "paid by him under or in respect of" refer to the person paying, and imply a knowledge on his part of the contract under which he makes the payment, and do not include a payment innocently made by him in the course of business. There is nothing in the language of the Act to justify our imputing to the Legislature the intention of enacting anything at once so aimless and so unjust as that suggested. Such an interpretation would enable a betting man to throw the payment of his bets on a bank that, having given him an overdraft, had honoured his cheques in the ordinary way of business without any notice or knowledge that they had been given for gaming purposes.

I will now turn to the facts of the case before us, which are as

(1) [1898] 2 Q. B. 337. (2) [1893] 1 Q. B. 44.
(3) [1901] 1 K. B. 11.

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follows: The defendants are described in the writ as a "firm." It appears that the so-called firm was constituted of the defendant Maughan, a man named Miller, and a man named Stephens, who associated themselves together for the purpose of bookmaking, and they carried on this betting business under the title of Stuart King, which is the style under which the defendants are sued in this action. The plaintiff was one of their customers, and the documents shew a long string of horse-racing bets made by him with the so-called firm. One of those bets was won by him, and it turned the balance of account in his favour to the extent of 108*l.* 10*s.* A cheque for this sum was given to him by the defendants which was signed by the defendant Maughan in the name of Stuart King, which was the usual form in which cheques were signed on behalf of the so-called partnership. The cheque was not duly met, and was held over by the plaintiff for a time during which sums amounting in the whole to 60*l.* were paid on account, and it is for the unpaid balance of 48*l.* 10*s.* that this action is brought. The writ claims the sum of 108*l.* 10*s.* as due on an account stated, and gives credit for the sums paid on account. According to the indorsement on the writ, the date of the account stated is November 4, 1907, which is the date of the cheque. The writ was not served on the defendant Maughan, but on Miller alone, and judgment was signed against all the defendants for want of appearance. The defendant Maughan applied to set aside the judgment, alleging that the so-called partnership had come to an end and that the judgment was a collusive one, the writ having been served on Miller, who was secretly the ally of the plaintiff, so that knowledge of the action should not come to Maughan. It is not necessary to enter into any of these matters further than to say that the judgment was set aside upon terms and leave to defend the action was given to Maughan, and that it came on for trial without any further pleadings than the writ. It was heard as a short cause before Darling J. without a jury on March 20, 1908, and he found for the plaintiff for 48*l.* 10*s.* The defence set up at the trial was that the claim arose out of betting transactions and that the sum was not recoverable at law. It was not denied that the cheque was for the amount won on betting transactions.

The plaintiff gave evidence to the effect that after the cheque had been given to him Maughan had rung him up on the telephone on November 5 and told him not to present the cheque, but to hold it over for a few days and to keep it quiet, and that this request was repeated a few days later, Maughan saying that, if it was not paid and their other customers knew of it, it would ruin them. It appears to me that it must be taken for the purposes of this case to have been proved that requests to hold the cheque over for a while, and statements that if the defendants were pressed for payment they could not pay it, and that if it were known that they had failed to do so it would ruin their so-called business, were in fact made by the defendants to the plaintiff, and that the plaintiff did in consequence of these requests forbear to present the cheque, although it is not suggested that he undertook not to do so for any specified time. The learned judge held that if the action were on the cheque it must fail, but so far as can be learned from counsel he allowed the writ to be amended and the action to be changed into an action brought upon a supposed contract, the consideration for which was the holding over of the cheque and the not telling the defendants' customers of their default in not paying. No amendment was in fact made, nor is there anything to shew what amendment was authorized by the judge. Apparently matters were left in this most unsatisfactory position, that, if by any amendment a good cause of action on the facts could be established, such amendment was to be taken to have been made, but neither the judge nor any of the parties formulated any such cause of action.

I cannot think that it was ever intended that cases should be permitted to come on appeal in such a condition as this. The Rules of the Supreme Court give wide powers of amendment, and it is unquestionably the intention of those rules that proper amendments should be made, even during the course of a trial, so as to bring out the true nature of a plaintiff's claim where it has been imperfectly or even incorrectly stated in the pleadings. But nothing in my opinion permits the Court to give judgment on a claim (other than a claim of the nature of an account) which is neither formulated in the pleadings nor satisfactorily defined in any way. It is not the business of the judges of the

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Court of Appeal to tax their ingenuity to see whether on the facts as they come before them some good cause of action could have been formulated. To accept such a function as this is to do great injustice to the parties in the case, inasmuch as it is impossible to know what course they would respectively have taken or what evidence they would have called had the claim been so formulated before the Court of first instance while there was still time to decide how to support or to meet it. In my opinion the Court of Appeal ought in such cases to refuse to attend to amendments not specifically made in the Court below. In the present case it is not clear, even from the statements of the counsel employed in the case (and there is no other material before us), what is the cause of action upon which the learned judge has pronounced in favour of the plaintiff. As, however, I am of opinion that no good cause of action whatever could be based on the facts of this case, I shall in the present instance deal with all the suggested forms of claim.

In the first place, I am of opinion that the action is wholly unsustainable as having been brought against a firm in the firm's name and in accordance with the procedure provided for such cases. The so-called firm was an association for the purpose of carrying on a betting business and nothing else. This was admitted at the trial and is evident from the so-called deed of partnership which was put in, and the cheque which was in the name of the partnership was for bets, so that all parties knew that betting was a partnership purpose. In my opinion no such partnership is possible under English law. Without considering any other grounds of objection to its existence, the language of the Gaming Act, 1892, appears to me to be sufficient to establish this proposition. It is essential to the idea of a partnership that each partner is an agent of the partnership and (subject to the provisions of the partnership deed) has authority to make payments on its behalf for partnership purposes, for which he is entitled to claim credit in the partnership accounts and thus to receive, directly or indirectly, repayment. But by the Gaming Act, 1892, all promises to pay any person any sum of money paid by him in respect of a wagering contract are null and void. These words are wide

enough to nullify the fundamental contract which must be the basis of a partnership, and therefore in my opinion no such partnership is possible, and the action for this reason alone was wrongly framed and should have been dismissed with costs.

Taking next the action as defined by the writ, and assuming that the defendant was sued as an individual and not as a member of a firm, I have no hesitation whatever in coming to the conclusion that the action was in fact brought upon the cheque which was given for the sum won upon the bets which the plaintiff made with the defendant. There is no suggestion of any account having been stated otherwise than by the cheque itself, and there is nothing, therefore, to distinguish this from an ordinary action brought on an unpaid cheque, credit being given for moneys paid on account of the sum due thereon prior to the date of the writ. It was not contested that if the action was to be taken to have been brought upon the cheque it could not be supported by reason of the provisions of the Gaming Act, 1835. The case is equally hopeless if it be brought upon the cheque as an account stated. There is no doubt that a cheque may be evidence of an account stated, but that cheque must under that statute be taken to have been given for an illegal consideration, and an account stated for an illegal consideration is as unenforceable as a cheque given for an illegal consideration. And, apart from the fact that the alleged account stated is a cheque, the mere fact that the account stated is for bets would, under the provisions of the Gaming Act, 1845, which render wagering contracts null and void, suffice to render the action unsustainable. Counsel for the plaintiff realized that his case was hopeless if it had to depend on the cheque, and he faintly suggested that the action was brought not upon the cheque, but upon the balance of account for which that cheque was given—in other words, that it was an action not upon the cheque, but upon the consideration for the cheque. That cause of action is equally bad. It would be a plain case of suing for money won on bets.

The learned judge appears to have held that all the above causes of action would be unsustainable. But he then proceeded to deal with a cause of action not suggested in any

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way on the writ or even consistent with its indorsement, namely, that the money was due on a special agreement between the plaintiff and the defendants at a later date than the alleged account stated whereby the defendants promised to pay the sum due in respect of the cheque if the plaintiff would hold the cheque over for a time and would conceal the fact that it had not been met. The plaintiff himself thus explained it in his affidavit in opposition to the summons to set aside the original judgment. "The amount for which I have obtained judgment is the balance due to me on a cheque for 108*l.* 10*s.* now produced and marked B, which the defendants requested me to hold over, as, had I then presented it, it would have been dishonoured, which would have seriously injured, if not actually ruined, their business. I did not sue on the cheque, as I had not presented it for payment at the time of action brought, there being only a payment of 48*l.* 10*s.* due on said cheque." The learned judge held that the plaintiff was thus asked to hold over the cheque and to say nothing about its not being paid, as it would damage the defendants' business and prevent other people betting with them, and held that compliance with this request amounted to good consideration for the promise to pay the bet, and that the plaintiff was entitled to recover.

I am of opinion that the learned judge was wrong in so holding. Upon the interpretation which I give to the language of s. 18 of the Gaming Act, 1845, no promise to pay a bet is enforceable, whatever be the consideration for that promise. But there is no doubt that some authority exists in favour of the view of the learned judge in the Court of first instance, although none of the authorities cited have, I believe, been examined by the Court of Appeal. The first of such cases, under the authority of which all the others appear to have been decided, is *Bubb* v. *Yelverton.* (1) The facts of this case are very peculiar, but Lord Romilly M.R. held that a bond was good which had been given for a sum of money admittedly in compromise for sums won on bets. I cannot help feeling that the learned judge was affected by an argument based on the language of the statute of Anne and the amending statute of 1835, which seem to place bonds in

(1) L. R. 9 Eq. 471.

a special and peculiar position by reason that they are not named in the enacting part of the amending statute, although they are named in the repealing part. He was also influenced by the fact that there would be serious loss to the estate if the bets were not paid or compromised, because valuable nominations made by the Marquess of Hastings (who was the person who had made the bets) would thereby become void, and heavy claims for damages might in consequence be made against the estate in respect of horses having been sold with their nominations. All these special circumstances make the case one which should not be taken as a precedent for any general proposition as to the enforceability of contracts of this kind. But in my opinion none of these special circumstances justify the decision. The bond constituted an agreement to pay money won on wagers, and by s. 18 of the Gaming Act, 1845, no action could be brought upon it.

This case was professedly followed by Buckley J. in *In re Browne, Ex parte Martingell.* (1) The circumstances of this case also were peculiar. Bills to the amount of a betting debt were given in consideration of a letter of complaint, which had been sent to the committee of a club, being withdrawn, and the learned judge held that these bills were not for the bet, but for a wholly new consideration, and were valid. If this means that the judge found as a fact that the bills were not in payment of the bets, but were simply the price of the withdrawal of a letter of complaint that had actually been sent, there is ground for saying that the case had nothing to do with the laws against gaming and therefore laid down no principle with regard to them. I think this must have been the case. Had the judge been of opinion that the bills were given (among other things) to pay the gaming debt, they would come directly within the provisions of the Gaming Act, 1835, and must be deemed to have been taken for an illegal consideration. It is settled law that a bill for a consideration which is partly illegal cannot be enforced at all (see the judgment of Collins M.R. in *Moulis* v. *Owen* (2)), and therefore I think that the learned judge must have come to the conclusion in fact to which I have referred, namely, that the bills were not in any respect given

(1) [1904] 2 K. B. 133. (2) [1907] 1 K. B. 746.

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in payment of the bet, but entirely for a new consideration. Finally there is the case of *Goodson* v. *Baker* (1), where A. T. Lawrence J. held that a post-dated cheque for 355*l.* given in respect of a betting claim of 375*l.* could be sued upon, because it was a settlement of a claim for a larger amount and time was given to the defendant to pay, and also because it was vital to the business of the defendant, who was a bookmaker, that he should not be posted as a defaulter. I cannot think that this case was rightly decided. It was an action to recover money alleged to have been won on wagers, and therefore, in my opinion, it was expressly barred by s. 18 of the Gaming Act, 1845. But, apart from this, the action was upon a cheque which the learned judge held to have been given in settlement of a claim for money won on bets upon horse races. The consideration for the cheque therefore included, if it did not wholly consist of, moneys won by gaming. Such a cheque comes within the express terms of 9 Anne, c. 14, as originally passed, and would have been rendered void by that statute. It must accordingly, by the provisions of the Gaming Act, 1835, be deemed to have been given for an illegal consideration, and therefore was unenforceable by action brought by the payee, who had full knowledge of all the facts. Nor does this decision of A. T. Lawrence J. appear to me to be even in accordance with existing decisions. In the case of *Chapman* v. *Franklin* (2) the Divisional Court decided that neither forbearance, nor an agreement to take a smaller amount in settlement, constituted good consideration for a promise to pay money won on bets, and I cannot see anything in the facts in *Goodson* v. *Baker* (1) which indicates that any new consideration had in fact been introduced in the way of an undertaking not to disclose the fact of the default, assuming that such an undertaking would constitute good consideration. The learned judge did not find as a fact that any such extraneous consideration had been given. He merely found that the desire not to be posted as a defaulter influenced the defendant in agreeing to give the cheque. I cannot see what relevancy this case can have. If accepting a post-dated cheque for a bet is good consideration for a valid contract to pay the bet, it must be so whatever be the

(1) 98 L. T. 415. (2) 21 Times L. R. 515.

motive which has led to its being offered. In other words, if the decision in *Goodson* v. *Baker* (1) be good law, bookmakers who on settlement day accept a post-dated cheque for the amount claimed by them, or who consent to make a reduction on their claim, are entitled to the services of the Courts of law to enable them to collect their winnings.

Finally it was suggested before us that there was a contract, not to pay the bet, but to pay a sum equal to it in amount, and that the consideration of that contract was a promise not to tell of the defendants' default. In the first place I am of opinion that no such contract was in fact made. There is no trace or suggestion of any such contract in the judge's notes or in his judgment, nor does counsel suggest that any reference or allusion to such a contract was made on the trial of the action. The language of the learned judge shews that the promise which he held to be enforceable was a promise to pay the bet and nothing else or different, and no leave to amend can authorize the Court of Appeal to find that a special contract was in fact made when the evidence is silent about it and establishes the making of a different and inconsistent contract. Nor do I feel in the least tempted to do so in order to render successful an ordinary attempt to obtain payment of a bet under threat of exposure. But if such a contract had been formally made, it would not, in my opinion, better the position of the plaintiff. I should unhesitatingly hold that such a contract was only colourable, and that the real intention of both parties was that the bet should be paid. Even apart from this, the alleged contract would, in my opinion, be unenforceable. If a son loses a bet of 20*l.* which he cannot pay, it makes no difference, in my mind, whether the bookmaker says "I will tell your father if you don't pay the bet," or "I will tell your father if you don't give me 20*l.*" In the one case he is trying to get a contract to pay the bet, and in the other case a contract to pay blackmail. Neither of these contracts will be enforced by the Courts.

For these reasons I am of opinion that the appeal ought to be allowed and the action dismissed with costs.

(1) 98 L. T. 415.

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FARWELL L.J. read the following judgment:—This is an action for a balance upon an account stated, the full amount stated as being originally due being 108*l.* 10*s.*, which is the amount of a cheque drawn by the defendant and given to the plaintiff in payment of a bet made by the defendant's firm with the plaintiff. It is admitted that no action could be successfully brought on the cheque, and it is in my opinion equally clear that no action will lie on an account stated of which the bet or the cheque forms the foundation: such an action is brought on an admission of a sum of money due and is a recognized cause of action, but it does not create a merger or destruction of the items of such account, and if such items are illegal, the action fails: *Rose* v. *Savory* (1); and whether the 108*l.* 10*s.* lost on the bet is regarded as a void or as an illegal transaction is immaterial so far as an action in this form is concerned. But the plaintiff's counsel states that he proved a case (to which I will refer presently) which amounts to a fresh and different cause of action on a special contract, and he states that the learned judge gave him leave to make all necessary amendments, and I assume that he did so. But in my opinion it is the duty of the plaintiff's counsel, a duty which ought to be enforced by the judge, when he asks for an amendment which raises a fresh issue or a fresh cause of action, to formulate and state in writing the exact amendment that he asks, in justice to the defendant, in order that he may know exactly the new case that he has to meet, and to the judge in order that he may know exactly what he is asked to try, and to the Court of Appeal in order that they may know what has been tried and decided. This is in accordance with Order XXVIII., rr. 8, 9, and with the usual practice in the Chancery Division. Order XXVIII., r. 12, does not mean that an order may be made in general terms, but gives a general power to make proper orders in all cases for determining the real questions. While, therefore, I think that the amendment should be allowed, I think that, as the plaintiff's counsel did not ask for or obtain it in proper form, the respondent should not in any case have the costs of the appeal.

The facts proved, and relied on as a good cause of action, are

(1) (1835) 2 Bing. N. C. 145.

shortly these: A bet made by the plaintiff with the defendant's firm, and lost by the latter; a cheque for 108*l.* 10*s.* sent in payment on November 4, a request on November 5 from the defendant's partner to the plaintiff, acted on by the plaintiff, to hold the cheque over and to refrain from publishing their default to other bookmakers, and a promise in consideration thereof to pay the 108*l.* 10*s.* by instalments as soon as the firm got the money. No point was made by counsel that the partnership was illegal, and I am not prepared to overrule the decision of Chitty J. in *Thwaites* v. *Coulthwaite*. (1) The alleged consideration for the special contract is therefore—(1.) giving time; (2.) refraining from publishing the defendant's default. Now the first is in my opinion no consideration at all; to give time for a payment that can at no time be enforced is nothing at all. But the second has been held by Darling J. to be sufficient. I do not propose to go through the cases which have already been exhaustively dealt with by the President, with whose judgment I agree, but I propose to consider the question on principle.

Any lawful act done or forborne by the plaintiff at the request and for the benefit of the defendant is a sufficient consideration to support a promise to pay by the defendant. All betting is not illegal because in certain places and under certain conditions it is made an offence by Act of Parliament, nor because bets which were enforceable as contracts at common law have been made by statute unenforceable as void or on an illegal consideration. There is certainly nothing illegal in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word. Lost bets are still regarded as debts of honour; in other words, all honourable men regard the payment of money lost on a bet as a duty of imperfect obligation, and the payment of bets is indirectly enforced by the social stigma attached to a defaulter, and also by certain disqualifications consequent on posting. There is nothing illegal in an unpaid winner calling to his aid those resources, and, if so, there is nothing illegal in his agreement not to do so in consideration of the payment of the amount lost. Although

(1) [1896] 1 Ch. 496.

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the law will not enforce payment of a bet, it will not restrain the winner from putting in force such extra-legal remedies as he may have by posting the defaulter or otherwise. The appellant's counsel says that this is mere blackmail; but blackmail (I quote the Oxford Dictionary) is "to extort money from, by intimidation, by the unscrupulous use of official or social position or of political influence or vote." So long as lost bets are regarded as debts of honour, I cannot bring myself to describe as blackmail the use by the man aggrieved of the ordinary means allowed by society to compel the loser to comply with the dictates of honour. Every one is entitled to enforce, if he can, the performance of a moral obligation, at any rate so long as it is done by the person for himself, and so long as no more than the full performance of the obligation is required. I wish to guard myself against the suggestion that any one other than the person aggrieved can use the forbearance to post as a consideration, or that forbearance to post a man for non-payment of a 100*l.* bet, would justify a request for more than 100*l.* Debts of honour do not traffic in interest or bonus.

I have dwelt upon this point because it appears to me to be the gist of the case; for although the law does not enforce, it does not absolutely disregard, duties of imperfect obligation. A moral obligation is not sufficient as a consideration, but an illegal or immoral purpose will vitiate a transaction with a consideration that would otherwise be legal. A bond in consideration of future immoral cohabitation is of course bad, but in *Turner* v. *Vaughan* (1) it was said that a bond given in consideration of past cohabitation and as premium pudoris was good both in law and in equity; and Gould J. said: "The Court may take this for a lawful and conscientious consideration; we must presume that the defendant hath done what in honour and conscience he ought to have done, and that he thought himself a wrongdoer, and gave the plaintiff this bond to make her amends." In *Nye* v. *Moseley* (2) Bayley J. says: "It is clearly established, that a bond given to a single woman by a single man, as premium pudicitiæ, at the time when he determines the illicit connection, is valid between the parties"; and the Court

(1) (1767) 2 Wils. 339.

(2) (1826) 6 B. & C. 133, at p. 138.

certified on a case sent by the Vice-Chancellor that the fact that the man was married made no difference. But a parol agreement to the same effect is insufficient, and in *Binnington* v. *Wallis* (1) the Court distinguished the cases on bonds "because they are all cases of deeds, and it is a very different question, whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void."

To apply this reasoning to the present case. A mere debt of honour will not support a parol contract to pay, and any bond, security, cheque, or contract to pay a bet is to be deemed illegal and is also void; but the actual payment is not illegal, and is, in fact, a debt of honour or duty of imperfect obligation; if, therefore, another and distinct legal consideration can be established, there is nothing in the payment of a sum equal to the amount of the bet to taint such consideration; the agreement not to have recourse to the stringent remedies available under the recognized rules of racing is a perfectly good consideration, unless there be such a taint, and I see no reason for holding that such taint exists in the case of the lost bet. It is not for this Court to treat as illegal that which was legal at common law, and which the Legislature has not made illegal, because stern moralists may reasonably disapprove of it. The doctrine of public policy is regarded nowadays as one rather for the Legislature than the Courts, although the Courts will not shrink from acting on it if the contract sought to be enforced leads to immorality or crime. It is sufficient to refer to *Wilson* v. *Carnley*. (2) I find nothing in any of the Acts that have been cited contrary to this view. There is no enactment making betting in general (as distinct from betting in particular places, &c.) or the payment or receipt of bets illegal. The object of the Legislature was to abrogate the old common law remedy and to prevent any bet or any security for or any note or the like founded on a bet from being put in suit. The illegality is to be deemed to be in the consideration for the bet or document sued on, not in the purpose, and such illegality

(1) (1821) 4 B. & Al. 650. (2) [1908] 1 K. B. 729.

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taints the whole cause of action which is based on such consideration, but nothing more. The Acts in effect sweep out of existence, for all purposes of action, all promises to pay bets and all securities, notes, bills, &c., for enforcing such payment, but they leave the betting debt untouched as a debt of honour. If they had made it illegal, then *Fisher* v. *Bridges* (1) would have applied, and the agreement not to post and the consideration proceeding therefrom would have been for an illegal purpose and void. The same distinction was recognized at common law before wagers became the subject of statutory enactment. Such wagers were regarded as contracts and lawful, but only if the wager had for its subject-matter something which could lawfully be the subject of contract which the Courts would entertain. Here the agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter; the sum of money may be equal to or less than the lost bet, but it is not payment of the bet, because that was payable on settling day, and non-payment on that day made the loser a defaulter and liable to be posted. The day of payment is most material, for non-payment may involve the winner in a similar default; the contract not to post is a new contract quite distinct from the contract of wager and is sufficient to support a promise to pay money, which, though equal to the amount of the bet, is not in fact the bet, but is compensation for its non-payment, and the action cannot be said to be brought for recovering any sum alleged to have been won on any wager within 8 & 9 Vict. c. 109. If betting is to be made illegal, it is for the Legislature to make it so in express terms, not for the Court to strain the letter of Acts passed for a different purpose in order to effectuate what we may consider a beneficial purpose, and in support of this I cite a sentence from the judgment of Fletcher Moulton L.J. in *Rex* v. *Roberts* (2): "Just as our abhorrence of crimes of violence is no excuse for lynching, so the indignation we feel at municipal corruption"—for this I read "betting"—"and our appreciation of its danger do not justify our straining the meaning of the law to create what we may fancy would be an effective remedy." I agree with the

(1) (1854) 3 E. & B. 642. (2) [1908] 1 K. B. 407, at p. 433.

President in thinking that the appeal should be dismissed without costs.

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Appeal dismissed.

Solicitor for plaintiff: *Henry Benjamin.*
Solicitors for defendant Maughan: *H. Dade & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

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ATTORNEY-GENERAL *v.* DUKE OF RICHMOND, GORDON AND LENNOX (No. 1).

Revenue—Estate Duty—Allowance—Incumbrances—Bona-fide Creation—Consideration—"Wholly for the Deceased's own Use and Benefit"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1 (*a*).

In 1897 the Gordon Richmond estates in Scotland were subject to an entail in the Scotch form under which the defendant's father, the Duke of Richmond, was heir of entail in possession, and the order of succession after him was (1.) the defendant, (2.) his son Lord S., (3.) the heirs male of the body of Lord S. In that year the Duke took proceedings in the Court of Session under the Entail Acts for Scotland to obtain the approval of the Court to an instrument of disentail, without the consent of the defendant and his son. Following the proper procedure under those Acts, the interests of the defendant and Lord S. under the settlements were valued at 415,000*l.* and 287,000*l.* respectively, and the Duke executed bonds charging the estates with those sums. The Court thereupon approved an instrument of disentail which was duly recorded and registered. The Duke thereupon became entitled to the estates in fee simple subject to those charges. The defendant and his son settled the sums secured by the bonds upon the defendant for life with remainder to Lord S. In 1898 the Duke made a revocable mortis causa disposition of the estates subject to the mortgage bonds by which they were entailed after his death to the defendant and Lord S. in succession with remainders over as before, but, owing to the fact that Lord S. had issue living at the date of this deed, its effect was to tie up the estates for another generation. Interest on the bonds was not paid in full to the defendant during the life of the Duke, but he executed further bonds charging the estates with a balance due to the defendant to the amount of 88,314*l.* The main motive of the Duke in thus resettling the estates was to lessen the amount of estate duty payable on his death, but all the deeds and instruments, including the bonds, were genuine instruments intended to have their full operation. The defendant's father, the Duke, died in 1903, and the

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defendant claimed to deduct from the capital value of the estates passing on the death, which amounted to 1,102,221*l.*, for the purpose of estate duty certain debts and incumbrances, including the bonds for 415,000*l.* and 287,000*l.* and 88,314*l.*, leaving an excess of debts and incumbrances over the value of the estates as ascertained for the purposes of estate duty of 47,092*l.*:—

Held, that the bonds were incumbrances created bona fide for full consideration in money's worth wholly for the deceased's own use and benefit within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, and that the defendant was therefore entitled to make the deduction claimed.

APPEAL from a decision of Bray J. (1)

Information by the Attorney-General.

The informant prayed that it might be declared that in the assessment of the "Gordon Richmond estates" for the purposes of estate duty under the Finance Act, 1894, upon the death of the late Duke of Richmond, Gordon and Lennox, deductions ought not to be allowed for the sums comprised in two bonds, for 415,000*l.* and 287,000*l.* respectively, given by the late Duke to the defendant and to his son, nor for the sums comprised in certain further bonds, amounting to 88,314*l.* 8*s.* 10*d.*, given by the late Duke to the defendant, the same not being debts or incumbrances incurred or created by the late Duke bona fide for full consideration in money or money's worth wholly for the use and benefit of the late Duke within the meaning of s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. (2)

The facts are fully stated in the report of the case in the Court below and in the judgment of Cozens-Hardy M.R., and it is thought that the following short summary will be sufficient for this report.

In 1897 the defendant's father, the late Duke of Richmond, was heir of entail and enfeft and in possession of the Gordon

(1) [1907] 2 K. B. 923.

(2) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7, sub-s. 1: "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—

(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Richmond estates in Scotland under the provisions of a deed of entail dated August 7 and 9, 1872. Under this entail the order of succession after the late Duke was as follows: (*a*) The defendant; (*b*) Lord Settrington; (*c*) the heirs male of Lord Settrington's body; (*d*) the other heirs male of the body of the defendant; (*e*) the other heirs male of the body of the late Duke; (*f*) the heirs female of the body of the present Duke; (*g*) the other heirs female of the body of the late Duke; (*h*) the nearest heirs whomsoever of the late Duke; (*i*) the nearest heirs and assigns whomsoever of the defendant. This deed also contained a power for the late Duke and the defendant jointly at any time of their joint lives to deal with and dispose of the estates as if they were held in fee simple free from any fetter of entail. This power was exercised by the late Duke and the defendant jointly on two occasions for the purpose of enabling the late Duke to borrow money. By the same deed of entail an annuity of 3000*l.* was made payable to the defendant by the late Duke during his lifetime. On April 12, 1897, the late Duke, who was then seventy-nine years of age, presented a petition to the Court of Session in Scotland, asking the Court, on the fulfilment by him of certain conditions, to approve of an instrument of disentail. This procedure was authorized by a series of Scotch Acts, called the Entail Acts, by virtue of which the late Duke, as heir of entail enfeft and in possession of the estates, was entitled to disentail them with the consent of the defendant and Lord Settrington, or without their consent by paying into a bank or giving proper security over the estates for the value in money of their respective expectancies or interests in the entailed estates, such values being ascertained by the Court. The proper procedure was followed by the late Duke, and the interest of the defendant was valued by the Court at 415,000*l.*, and that of Lord Settrington at 287,000*l.* On October 6, 1897, the late Duke executed a bond and disposition in security in proper form in favour of the defendant for 415,000*l.*, and another in favour of Lord Settrington for 287,000*l.*, which were duly registered on October 19, and on October 20 the Court made a decree on the petition approving an instrument of disentail which had been executed by the Duke on June 19, and ordering the keeper of the Register of Tailzies to

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record the same in the said register. The instrument of disentail was accordingly recorded and registered on November 19, and by means of this instrument, on the same being duly recorded and registered, the late Duke became owner in fee of the estates subject to some old incumbrances and also to the new incumbrances of 415,000*l.* and 287,000*l.* By an assignation and deed of trust dated November 11 and 15, 1897, and recorded on November 18, 1897, the defendant and Lord Settrington assigned the sums of 415,000*l.* and 287,000*l.* secured to them by the beforementioned bonds and all interest thereon to trustees upon trust to pay the income to the defendant for life and after his death to Lord Settrington, with divers limitations over. On April 20, 1898, the late Duke made a mortis causa disposition and deed of entail of the Gordon Richmond estates, whereby he conveyed and disponed them from his death—(*a*) to the defendant; (*b*) to Lord Settrington; (*c*) to the heirs male of the body of Lord Settrington; (*d*) to the other heirs male of the body of the defendant; (*e*) to the other heirs male of the body of the late Duke; (*f*) to the heirs female of the body of Lord Settrington; (*g*) to the other heirs female of the body of the defendant; (*h*) to the other heirs female of the body of the late Duke. This disposition was different in several particulars from the deed of entail of 1872, but the substantial difference was that, owing to the fact that in 1898 Lord Settrington had issue living, the estates were tied up for one further generation. In 1899 and again in 1903 the late Duke charged the estates subject to all the incumbrances, including those of 415,000*l.* and 287,000*l.*, to secure two sums of 6000*l.* and 5000*l.* borrowed by him. In the latter the defendant joined, at the late Duke's request, for the purpose of giving his consent to postpone the securities held by him in respect of interest on the two bonds. The interest on the two bonds of 415,000*l.* and 287,000*l.* was payable to the defendant under the assignation and deed of trust of November, 1897, and a mandate for the trustees authorizing payment to the defendant. It was not paid in cash by the late Duke, but on January 24, 1899, an account was stated and signed between him and the defendant. This account shewed, on the one side, the interest due on the two bonds, and, on the

other, certain voluntary payments which the late Duke had been in the habit of making for many years prior to 1897 to or for the benefit of the defendant, and the balance brought out as due to the defendant as at November 11, 1898, was 18,476*l.* 3*s.* 5*d.*, and on February 2 the late Duke executed a bond and assignation in security for that amount in favour of the defendant. This bond was duly registered on February 8, 1899. Similar accounts were stated and similar bonds were given each year down to the death of the late Duke and duly registered. The total amounts of those bonds amounted to 88,314*l.* 8*s.* 10*d.* The late Duke died on September 27, 1903. After his death the defendant delivered to the Commissioners of Inland Revenue an account of the Gordon Richmond estates as passing on the death of the late Duke for estate duty purposes. On the credit side of these accounts the capital value of the estates was shewn as 1,102,221*l.* 13*s.* 9*d.*, and on the debit side deductions for debts and incumbrances amounted to 1,149,314*l.* 8*s.* 10*d.*, leaving an excess of debts and incumbrances over the value of the property of 47,092*l.* 15*s.* 1*d.* These deductions included the bonds for 415,000*l.* and 287,000*l.*, and the further bonds amounting to 88,314*l.* 8*s.* 10*d.*

The information alleged that neither the defendant nor his father ever desired that the estates should become free or unentailed, but they did desire that the payment of estate duty should be avoided, and for this purpose they arranged and agreed with the concurrence of Lord Settrington that the form of a disentail and of a valuation of, and giving security for, the interests of the present Duke and Lord Settrington should be gone through, but that the estate should be resettled so that the whole would in fact devolve as if no disentail had purported to be made. The estates would thus be made to appear on the late Duke's death as subject to incumbrances actually exceeding their value.

Sir W. S. Robson, A.-G., Sir R. B. Finlay, K.C., and *C. H. Sargant*, for the appellant. The onus of proving the bona fides of the transaction is on the Duke. The question is, Has he discharged the onus cast upon him by s. 7, sub-s. 1 (*a*)? The incumbrances must have been created "bona fide" and "wholly for

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the deceased's own use and benefit." The late Duke took nothing by this transaction, except an equity of redemption worth nothing, or rather 48,000*l.* worse than nothing; the benefit was to those who followed the Duke in thus escaping duty, but the deceased took no benefit. The meaning of the words "bona fide" in a statute was considered in *Penn* v. *Alexander* (1), from which it would seem that motive is the real test. The motive here was to escape duty, the very thing this sub-section is endeavouring to stop; and the fair inference is that the bonds given by the late Duke were not bona fide incumbrances.

[FARWELL L.J. If the present Duke had had the misfortune to get into difficulties, his trustee in bankruptcy could certainly have enforced these bonds against the late Duke for the benefit of the present Duke's creditors. Apart from motive, therefore, it cannot be said that this bond was not a bona fide incumbrance.]

The motive and purpose may be looked at in considering the question of bona fides.

[COZENS-HARDY M.R. The avoidance of estate duty is not an unlawful motive. I see a great difficulty in saying that these bonds both in form and reality were not valid "debts or incumbrances."]

The point is whether s. 7, sub-s. 1 (*a*), has prevented a transaction of this kind from being successful. We say it has. "Bona fide created" does not mean that the deeds really are what they purport to be, and have a genuine legal effect, but it refers to incumbrances bona fide created for the benefit of the deceased in the usual way, and this ingenious scheme would never have been entered into but for the Finance Act, and to escape the duty imposed by that Act. The meaning of "bona fide" was also considered in *Guardians of Fulham* v. *Guardians of Thanet.* (2)

Simms v. *Registrar of Probates* (3) and *Bullivant* v. *Attorney-General for Victoria* (4) are distinguishable. This transaction may in a sense be a bona fide transaction, in so far as it is honest and as the deeds and bonds are valid, but it is not effective

(1) [1893] 1 Q. B. 522.
(2) (1881) 6 Q. B. D. 610.
(3) [1900] A. C. 323.
(4) [1901] A. C. 196.

as against the revenue if made for the sole purpose of evading the Finance Act. This was not a transfer of property executed for the sake of the transfer itself or for the benefit of the late Duke, but it was a transfer executed solely for the purpose of evading estate duty, the very purpose contemplated and provided for by s. 7, sub-s. 1 (*a*).

Buckmaster, K.C., and *Austen-Cartmell* (*Danckwerts*, K.C., with them). The argument of the Crown is founded upon the notion that the whole transaction was a scheme concocted between the late Duke, the present Duke, and Lord Settrington to escape the payment of duty. The Crown tried to make out that a scheme was concocted by the common legal adviser of all the parties, and comment was made on the fact that privilege was claimed for communications with him.

[KENNEDY L.J. The observations of Lord Chelmsford in *Wentworth* v. *Lloyd* (1) shew that no presumption can be raised against a party by his insisting on professional privilege.]

Apart from that suggestion there is no evidence whatever of a scheme. Bray J. has in fact found that no scheme existed. The late Duke desired to disentail, and he carried out the disentailing by legal process, which was the best way to shew that there was nothing underhand about it. No doubt one of his motives was to reduce the amount of duty payable on his death, but it was not his only motive. He got the power of dealing with the estate and used it to resettle the estate. The new settlement tied up the estate for another generation. Lord Settrington was born before 1872, but then had no issue, and would therefore under Scottish law have barred the entail without any consent. He had issue living at the date of the re-entail, and therefore the property was tied up for another generation. It was said that the Duke retained a mere husk. But the scale of valuation of the estate for duty is 3½ per cent., and on that valuation the property was worth less than the charges; for any other purpose it would be valued on a scale of 4 per cent., and that would shew a large margin for the late Duke. When the late Duke had disentailed there was nothing left but the equity of redemption, and nothing else passed on his death: *Earl Cowley*

(1) (1864) 10 H. L. C. 589.

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v. *Commissioners of Inland Revenue.* (1) If this is so, no question could arise under s. 7, sub-s. 1. But the bonds in this case were within that section. They were made bona fide. The term "bona fide" in this and similar Acts means only that the transaction is genuine and not a sham; the motive for the transaction is unimportant: *Alexander* v. *Newman.* (2)

"The whole question is whether the transaction is colourable or real": per Lord Halsbury in *Simms* v. *Registrar of Probates.* (3) This is the first time it has been attempted to argue that the mere fact that something is done with the intention of escaping the payment of duty prevents it from being done bona fide. If that argument is right, *Attorney-General* v. *Beech* (4) was wrongly decided, and any number of gifts made by parents to children since the Act could be set aside. There is no such thing as evading an Act of Parliament: per Chitty J. in *Attorney-General* v. *Beech.* (4) The whole argument for the Crown is based on ignoring the distinction between motive and purpose, which is pointed out in *Topham* v. *Duke of Portland.* (5)

There is no doubt that the incumbrances were given for full value, for the interests of the present Duke and Lord Settrington were valued by an independent person appointed by the Court, and the consideration "in money's worth," i.e., the acquisition of the fee, was wholly for the late Duke's own use and benefit. What he intended to do with it is immaterial. Where the deceased has created a mortgage and received the money it makes no difference how he spends the money.

Sargant, in reply. The judgments in *Earl Cowley* v. *Commissioners of Inland Revenue* (1) do not apply to an incumbrance created by the deceased himself. Such an incumbrance must be governed by s. 7, sub-s. 1. This transaction was not bona fide, for it never would have been entered into at all but for the purpose of escaping duty, and it was not carried out for the benefit of the late Duke, but of his successors.

COZENS-HARDY M.R. This is an appeal from the judgment of Bray J., who dismissed an information by the Attorney-

(1) [1899] A. C. 198.
(2) (1846) 2 C. B. 122.
(3) [1900] A. C. 323, 325.
(4) [1898] 2 Q. B. 147, 157.
(5) (1863) 1 D. J. & S. 517.

General claiming estate duty on what I might call the Scottish estates of the late Duke of Richmond. I agree entirely with the judgment of Bray J., with the possible exception of the passage on the last page, which is in no way necessary for his decision, and I am not sure that I can really add anything to the force of his reasoning; but having regard to the importance of the case, it is right that I should express in my own words how the case presents itself to my mind, and I will endeavour to do that as briefly as may be.

Now there are many facts which are admitted in this case, and there are certain findings of Bray J. which, in a case like this, are binding upon us in the sense that nothing has been urged before us which would induce us to modify those findings. The admitted facts are these: The late Duke of Richmond was tenant in tail of very large estates in Scotland. Scottish law is of course for us a question of fact, and the Court below had the best possible evidence of what was the relevant Scottish law from the mouth of Mr. Clyde, who was the Solicitor-General under the late Government. It seems that according to Scottish law the Duke had an absolute right to bar the entail upon terms of making certain payments to, or giving certain security to, his son the Earl of March and his grandson Baron Settrington, they being the next two persons who would be entitled under the entail if it ran its natural course. The machinery provided by Scottish legislation is this: The tenant in tail presents a petition to the Court of Session, which is served upon the two next heirs, and a public official is appointed to assess the value of what I may call the expectancies—although that is possibly not strictly an accurate phrase—of the two next persons interested under the entail, and, when that amount has been reported to the Court and approved by the Court, the tenant in tail has a right either to pay cash to the amount of the valuation so approved, or to give to those persons a security upon the entailed estate for the ascertained amounts of the values of their interests. When that is done, the Scottish Court having approved the securities, the tenant in tail executes an instrument which is registered, the result of which is that the tenant in tail becomes absolute owner of the property. The entail is barred. The subsequent heirs in tail have no power to

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prevent this disentail and no right to object to it upon the terms which are imposed by statute, namely, that they shall receive, either in cash or in securities upon the estate, the amount of the assessed valuation. In the present case the Duke presented a petition. Valuations were made of the amounts due to the Earl of March and Lord Settrington, the figures of which were very large. The Earl of March's interest was valued at 415,000*l.*, and Lord Settrington's interest at 287,000*l.*, the fact being that the Duke of Richmond was at the date of the transactions in question a man very advanced in years. The Court of Session approved the valuation, approved the two bonds or mortgages for those amounts on the entailed estates which the Duke proposed to give, and ordered registration of the instrument, the result of which was that the entail was barred. These two bonds, one given to the Earl of March, and the other to Lord Settrington, became and were their own personal property, to be disposed of by them as they were minded. Shortly afterwards, they, the father and the son—the Earl of March and his son Lord Settrington—made what we on this side of the Tweed should call a settlement of these two bonds, and, in the language of the Scottish law, made an assignation of the bonds, the effect of which was that the Earl of March got during his life the income on both the bonds and on his death Lord Settrington would get the income on both the bonds; there were other subsequent limitations, and in the event of failure of those the bonds were to be divided between the Earl of March and Lord Settrington in proportion to the amount of their bonds. Of course those bonds were personal, movable property, and were not subject to the law of entail. The bonds carried interest. The Duke did not pay the interest fully, as and when due, to the Earl of March in the right of his own bond, or in the right of his title under the assignment of Baron Settrington's bond, but from time to time, having paid sums on account only of interest, he gave further bonds or securities to the Earl of March, also charged upon the property. The Duke shortly afterwards, and at no great time after the transactions I have mentioned, executed a mortis causa deed, or will as we should call it, by which he re-entailed the property and extended it to another generation. Of course that

fresh entail was subject to these bonds which had been given, and subject to one or two other small bonds which the Duke executed after the transaction in question. The Duke died some years afterwards, and a valuation was brought in for the purpose of estate duty upon which it appeared that, having regard to the mode in which the estate was valued for the purposes of estate duty, there was no surplus on the Scottish estates, after all these incumbrances had been brought into account. That being so, the present Duke claimed that there was no liability to pay estate duty. The Attorney-General filed an information claiming the duty.

Thus far I have dealt only with the admitted facts. But there are other facts which were challenged in the pleadings in the action and as to which evidence was adduced. It was alleged in the information that this was all a scheme made between the Duke, his son the Earl of March, and his grandson Lord Settrington, to which each of them was a party, for the purpose of depriving the Crown of estate duty, and that the whole transaction was not a real one, but it was understood from first to last that there would be no change in the devolution of the property, and that these were to be, in substance, mere paper and unreal transactions. That being so, evidence was given before Bray J., and the only evidence on this part of the case which was given was that of the present Duke of Richmond. The learned judge saw and heard the Duke, and he says this in his considered judgment: "It was impossible to listen to his evidence, as he gave it, without being convinced that he was telling the whole truth, and I accept his evidence as being absolutely true"; then he goes on to say: "As the result of his evidence I find as facts; (1.) That all the deeds and documents signed from 1897 onwards, including the bonds claimed as incumbrances, were genuine instruments intended to have their full operation without any reservation of any kind, secret or otherwise. (2.) That there was no such arrangement or even understanding such as suggested in the amended information. (3.) That it was the intention of the late Duke to bar the entail and to make himself owner in fee simple of the Gordon Richmond estates, subject to the incumbrances, including the bonds,

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but that the motive which mainly actuated him in taking the steps which he did for that purpose was that he would thereby diminish his estate and lessen the estate duty payable on his death." Lower down in his judgment Bray J. says that he accepts without reservation the Duke's denial that there was any such arrangement or understanding as has been indicated. He goes on to say that he finds the settlement of the moneys represented by the two bonds was not done at the suggestion of the late Duke, but was arranged between the defendant and Lord Settrington on the advice of Messrs. Brodie, acting as Lord Settrington's solicitors, and he says finally that there were some other circumstances which required consideration, but they have not prevented his coming to the clear conclusion that there was no such arrangement or understanding as suggested.

Now, that being so, what is there in the transaction which disentitles the present Duke to claim a deduction in respect of these bonds? It is said that they cannot be allowed by reason of the provisions of s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. That depends upon a few words in the clause which I must now read: "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances." Prima facie, therefore, debts and incumbrances are to be allowed; but then there is an exception, to which exception there is an exception, because it goes on to say: "But an allowance shall not be made (*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest." These incumbrances were of course plainly created by a disposition made by the deceased. It has not been disputed that they were made for full consideration in money or money's worth, for the figures which I have given were the figures ascertained by officials acting under the Scottish Court, and no suggestion can be made that full and ample consideration was not given to the Earl of March and Lord Settrington for the purchase of that which was

really their interest in the estate, or, possibly more accurately, the purchase of their power to prevent the Duke from disentailing the estate. But then it is said they were not created bona fide, because the leading motive, if not the sole motive, was to escape the incidence of estate duty. I am unable to satisfy myself that motive has anything whatever to do with this clause so far as we have to consider it. "Bona fide" is a perfectly well-known term; it is used again and again throughout this statute and in other similar statutes, and, after all, it means neither more nor less than created in good faith, not as a sham or as a mere paper transaction, not collusively or as part of a scheme to defraud anybody, but it must be an incumbrance created, and being in fact what it is in form, a genuine transaction, intended to have, and having, in truth, all the effect that its form enables it to have. In my view, it is quite unimportant to consider, when a mortgage is made by an owner of an estate, what his motive may be in effecting the mortgage. It may be that he wishes to raise money with a view to giving money to charity or to found a charity; it may be that he wishes to raise money for the benefit of a daughter on marriage, or for making a present to a son. It may be that he wishes to raise money, one motive for his so doing being to avoid the incidence of estate duty. That is an object and motive which is not illegal, is not immoral, and, so far as I know, there is no possible objection to be raised to an honest, honourable, real transaction, otherwise unobjectionable, merely because a man was induced to enter into it with a view to escaping the incidence of estate duty. I therefore, with great respect to the arguments which have been addressed to us on behalf of the Attorney-General, am unable to attach the meaning which the arguments suggest ought to be attached to the words "bona fide." I am content on this point to adopt the language of Bray J. that those words "provide that the transaction shall be a real and genuine transaction, intended to have full and real operation, without any secret or covinous arrangement or reservation."

Then it is said that these charges were not made for full consideration in money or money's worth, or wholly for the deceased's own use and benefit. What was the effect of this? It was really

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purchase-money for the fee, the absolute interest in the property, which the late Duke thereby acquired. That was acquired by himself for himself, and for nobody else. In point of fact, the late Duke did, after this transaction, borrow some money by mortgage bonds, for a comparatively small amount no doubt, upon the fee which he had thus created, subject of course to the prior securities which he had given. He acquired the fee, and had very good reason for so doing. He might have dealt with that in any way he pleased, but influenced, as he undoubtedly was, by a motive which, so far as my experience goes, is so common as to be almost universal with large landowners of his rank, he was minded to do that which he did, that is, to tie this estate up for another generation by the mortis causa deed, or will as we should say, which he executed and which came into effect on his death. I am unable to see in the facts of this case, and accepting as I do, implicitly and absolutely, the findings of Bray J., that apart from any scheme or arrangement such as is negatived, these were other than incumbrances created bona fide for full consideration in money, or money's worth, wholly for the deceased's own use and benefit.

That being so, for these short reasons, it seems to me that we should be wrong in attempting to put a meaning on the words "bona fide" which, so far as I am aware, has never been sought to be put upon those words in any other part of this Act, or of any similar Act, and I think we are bound to hold that what the Duke did was done honestly in accordance with the provisions of Scottish law, bona fide, and wholly for the benefit of the Duke.

I am of opinion that the judgment appealed from is right, and that this appeal must be dismissed.

FARWELL L.J. I am of the same opinion. The late Duke was heir of entail, and he was minded to avail himself of the powers given to him by several Scottish Entail Acts of buying out the interests of his successors, which he was enabled to do, either by paying them the value ascertained by the Court, or securing that value on the estate which he had so bought. He accordingly took the proceedings necessary in the Scottish Courts, and by deed duly executed and duly affirmed by the Court, and ordered by the

Court to be registered on October 20, 1897, he entitled himself to the estate in fee, and thereupon became and was the owner in fee, subject to these incumbrances. Down to that point there appears to me to be no sort of question. It was a valid transaction, the bonds were valid; the fee created was valid. There was nothing whatever to shew that it was other than what it appeared to be on the face of it, a perfectly straightforward transaction. But then it is said on behalf of the Crown that the motive was to escape duty. Assume that was so. I know of no law which prevents a man from avoiding a duty which has not attached to the property. The argument of the Crown treats this as though it were like the old succession duty and attached at the time of the passing of the Act as if that were the creation of a succession. But this duty does not arise until death, and a man is perfectly entitled, if he can, to avoid the payment of duty by disposing of his property in any way not forbidden by the Act. The argument that his motive is to escape duty appears to me wholly irrelevant, because a man is perfectly justified in avoiding and escaping the duty which will arise in the future, but which has not yet attached to any property which he possesses.

Then it is said that s. 7 prevents this transaction from being treated as what it really was. Now the Act provides that duty shall be levied on the value of the property which passes by death. There is no sort of doubt that the value of the property which passed on the Duke's death was the equity of redemption, but it is said that the proviso in s. 7 prevents that from being applicable, because no incumbrance created by the deceased himself is allowed to be deducted, unless such incumbrance created by the deceased himself was created bona fide. That is the first step. It is said this is not bona fide. If by that is meant not bona fide in the sense that the late Duke had in his mind the desire and motive to avoid the incidence of duty, then I say, that is not the meaning of bona fide. I put it in argument to Sir Robert Finlay that the incumbrances were created bona fide in the sense that there was no mala fides or fraud about it, and Sir Robert Finlay said: "Surely bona fide means this, that the transaction was one entered into for the purpose of borrowing on the face of

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it and not for the purpose of evading the duty." I can only say that it was entered into for the purpose of borrowing the money, for the purpose of getting money to buy the fee, and if the result or intended result was that it would also prevent duty from arising on the death of the Duke, I see no harm in it whatever, and that is not, in my opinion, the meaning of the words bona fide. Bona fide means that the transaction must be a fair and real genuine transaction for the purpose which it assumes to have on the face of the deeds. Wrap it up as one pleases, it is impossible to deny that to give to that which is in fact a sham a false air of reality, in order thereby to deprive some one (whether it be the Crown or anybody else) of something to which he would be entitled if the real facts of the case were allowed to appear through the concealing veil of the deeds, is nothing more nor less than fraud, and as I read the pleadings in this case, the Crown does charge the late Duke with a fraudulent intent—in fact not only the late Duke, but the present Duke and Lord Settrington—with a fraudulent conspiracy for the purpose of avoiding this duty. I can only say that that is entirely displaced by the evidence. There is not a shred of evidence to support it, and although it has been given up here, and any idea of charging fraud has been repudiated, still a great deal of the argument has been addressed to us which is irrelevant except in relation to this charge of fraud.

No question can arise as to full consideration, because that was assessed in the proper way by the proper Court and is not disputed. But great stress has been laid on this, that it was not "wholly for the deceased's own use and benefit." Now the money was borrowed by the Duke for the purpose of buying out the reversion. If he had borrowed the money from a third person and had paid it over to his son and grandson, I cannot see that there would be any room for argument. The Act enables him, instead of doing that, to charge it upon the estate, and he has done it. He has had the use and benefit of the money by means whereof he has bought the reversion. It is absolutely immaterial whether he spent it on buying the reversion or not, except in so far as the provisions of the Scottish Acts

enable him to do it in that form. When a man has once borrowed the money on his own land, he has the money to deal with as he pleases for his own benefit in any way he likes. The fact that he chooses to give it away in charity, or to give it as a portion for his daughter, or anything else afterwards, is to my mind absolutely irrelevant. Whether he does so deal with it because he desires that his estate at his death should not become subject to this duty or not makes no difference whatever. The question of motive has been pressed upon us, by Mr. Sargant especially, and he has tried to persuade us that there is no difference between "motive" and "purpose" or "object." To my mind, there is the very greatest difference, as Turner L.J. pointed out in *Topham* v. *Duke of Portland*. (1) Take this as an illustration: in the present case suppose that the Duke in desiring to purchase the reversion was induced by motives of anger against his son, and he desired to prevent his son from having Gordon Castle or to prevent his grandson from having it. What could it matter? It does not affect the object, which he had, of having the whole dominion over the fee, which he in fact obtained. What difference does it make that he is inspired by annoyance because the Legislature has imposed a duty, which he may rightly or wrongly think unjust, because it is a graduated and therefore an unequal duty? Whether he is right or wrong in so thinking is as immaterial as whether he would have done well or ill in being angry with his son, but, assuming that was the motive which inspired him, what difference does it make? Deeds which are executed and take effect as real, cannot be affected in any way by the motive which inspired the person, who executed them, so to execute them.

I only desire to add that it is very important that no comment should be deemed to be justifiable on the question that the solicitor was not called because the parties were entitled to claim privilege; nothing can be imputed against them because they did so claim that privilege, which the law has said it is in the highest degree desirable to allow in the interest of public policy. The same remark applies to some extent to the suggestion that the Duke had only a shell of

(1) 1 D. J. & S. 517.

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property in value left. In fact he had a very large interest left, but it is an irrelevant observation, except on the ground of fraud, as being an element to shew that it could not have been a real transaction. On these grounds, which I do not think in any way differ from Bray J.'s judgment, I think that judgment is perfectly right, stopping short as the Master of the Rolls has stopped, and that this appeal should be dismissed with costs.

KENNEDY L.J. In spite of the exceedingly lucid and helpful argument which the Court have heard from Mr. Buckmaster, it is, I confess, with less certainty than the other members of the Court have expressed, that I feel myself it is right I should come to the conclusion that this appeal should be dismissed, as the Master of the Rolls and Farwell L.J. have already stated.

I will try shortly to state my reasons. The contention of the appellants is twofold. First they say that this transaction was not an incumbrance created or incurred "bona fide" within the meaning of the sub-section with which we are dealing; and, secondly, that it was not in any case a transaction which came within the words "wholly for the deceased's own use and benefit." Now, in dealing with the first contention I wish it to be clearly understood that I do not for one moment intend to suggest any difference between the view which I take of the evidence given by the present Duke of Richmond, as a witness, and that which was taken by the learned judge in the Court below. I should not feel justified in coming to a different conclusion with regard to the good faith of a witness from the conclusion so emphatically expressed by Bray J., who heard the witness, and I will add that, having heard the evidence read, I see no reason whatever to doubt that this nobleman was a witness of truth. Therefore, what I say is upon that assumption, but the case has certainly been made, for me, more difficult by the suggestion, which I do not understand, that the success or failure of the appeal depends upon the proof of some scheme or arrangement, to which, contrary to that evidence, the then Earl of March and Lord Settrington must be held to be parties. Speaking for myself, it seems to me that what the section is dealing with is the act of the creator of the incumbrance, and

if, in this case, it is clear that Lord March and Lord Settrington, as they then were, could not have prevented the matter being carried through, it seems to me to be quite immaterial, that we should consider what their conduct in the matter was. I accept, as I say, fully and unreservedly the judgment on the facts which my brother Bray has passed. But then comes this question: Has the act of the late Duke of Richmond, in creating this incumbrance, been an act which is not "bona fide" within the meaning of the section? Now, I do differ from my brother Bray, and with great respect, it may be, if I understood him rightly, from Farwell L.J., in thinking that it is a question in which "motive" is the proper word to use. As a matter of everyday speech—and I am going to illustrate it from a very learned authority—the words "purpose," "motive," "reason," and "object" are daily, I agree, not accurately, used indifferently, and I think perhaps one of the difficulties I feel has arisen from what I take to be, with great respect, the error of Bray J. in testing the bona fides by referring only to the word "motive." The "motive" may be identical with "the reason," or "purpose," or "object," and it appears to me to be an appeal rather to subtlety than to sound sense to argue on "motive," as distinguished from "purpose," if you find on the facts that "motive" and "purpose" were in a given case identical. In the report of the judgment Bray J. (1) says, addressing himself to the meaning of "bona fide": "in my opinion motive has nothing to do with it." To my mind that is, in a sense and to some extent, begging the question. "Motive" may have nothing to do with it, but nobody could say that "reason" and "motive" may not be distinct. When we come to the actual evidence in the case, the present Duke speaks of the late Duke's "reason" for what he did. Now the reason for his conduct may mean "object" or "purpose." Here the Duke says, "The reason of my father for taking these steps, and, as far as he told me, his only reason, was to diminish the capital value of his estate for the purpose of lessening the death duties." By "reason" the witness really means purpose or

(1) [1907] 2 K. B. 923, at p. 936.

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object in view. Just to illustrate my meaning that bona fides may be judged by "purpose," let me take the case referred to of *Penn* v. *Alexander*. (1) Collins J., now Lord Collins, when asked to deal with the question of bona fide said: "What then is it which is to determine whether travelling three miles makes a man a bona fide traveller? It must be, in my opinion, the purpose with which he undertook the journey." And the same expressions are used as regards "purpose" by other judges in that case. Of course it may be true to say that "motive" will do as well. I think it might. But there was no attempt there to draw a subtle distinction between "motive" and "purpose" where the end to be attained is the one thing to be expressed. Erle C.J. in the case of *Taylor* v. *Humphries* (2), which is referred to by Coleridge C.J. in *Penn* v. *Alexander* (1), said: "We think that a person would be a traveller within the exception if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment." So one judge used the word "motive" and another used the word "purpose" in a practically identical sense. Whether you call it the "motive" or the "purpose" or the "reason" that the estate should have less to pay in death duties, the question is whether the transaction, done by him in creating these incumbrances and in dealing with the estate as he did for this end or purpose, is or is not consistent with "bona fides" within the meaning of the statute. Upon that I confess I have some little difficulty, but I do not think that, sitting here, it would be right that I should not follow the construction placed upon the same, or equivalent language, in the cases that have been cited and referred to by the counsel for the respondents. In matters practically in pari materia the Courts have held on more than one occasion that the expressions "good faith" or "bona fides" ought to be read in reference to the reality or unreality of the transaction itself. To be not in good faith, a transaction must be purely colourable, or, in other words, although there may be paper or parchment, they must not be parts of a real transaction, but simply forms never intended to have any real effect. I think the cases which my

(1) [1893] 1 Q. B. 522, 526. (2) (1864) 17 C. B. (N.S.) 539.

brother Bray referred to, and which have been properly referred to here, do go, as Mr. Buckmaster contended, the full length of that. It is impossible to say there was not reality about the transactions themselves from the time when the Duke began them in Scotland down to their conclusion. If there was, then it appears that, in accordance with the views expressed by Lord Halsbury and other judicial authorities, the requirement as to the "bona fides" has been satisfied.

It is impossible also not to assent to this, that there is certainly nothing essentially illegal in preferring one of two courses, which will avoid the incidence of a Taxing Act, to another course which will not avoid the incidence of that Taxing Act. I think perhaps the argument of the Crown is so far right that, if "purpose" is a proper word to use as equivalent to what the witness called "reason," to say that his purpose was to defeat the Act is quite another thing to saying that he has merely taken a course which would have that result. The question is whether the words "bona fide" can be referred not to the choice of one or two different courses, but to the central aim and intention of the act of the party. Upon the whole, I think, for the reasons I have given, that the requirement of bona fides is satisfied by there being a reality in the transaction which creates the incumbrance, and it is impossible not to say that there was that reality here.

With regard to the other words, "wholly for the deceased's own use and benefit," I feel, after having heard the arguments for the respondents, less difficulty. It may be, as I think both Mr. Buckmaster and Mr. Austen-Cartmell pointed out, possible that those words, "wholly for the deceased's own use and benefit," ought to be taken with the word "consideration" as aimed at preventing cases such as that which was put, of security or suretyship for the debt of another, which could not be treated as being the deceased's own use and benefit, in regard to the consideration received by the person who created the incumbrance.

At the same time, I certainly do not, with great respect, assent to the reasoning of my brother Bray on the last page of his judgment.

I desire to add that I express no opinion whatsoever as to

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what has been called the second point with which he has dealt, and I do not think the other members of the Court intend to express any opinion upon it either.

For the reasons I have stated, I am, on the whole, of opinion that the appeal must be dismissed.

COZENS-HARDY M.R. I desire to add that none of us, I think, express any opinion upon the other point, namely, that only the equity of redemption passed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Burch, Whitehead & Davidsons.*

J. R. B.

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March 31; *April* 1; *June* 27.

THORPE *v.* DAVIES.

Coal Mine—Check Weigher—Appointment—Mine—Two Seams in Mine—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 13, *sub-s.* 1.

By s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887, it is provided that the persons who are employed in a mine and are paid according to the weight of mineral gotten by them may appoint a check weigher.

In a mine not divided into parts under s. 19 of the Act there were two seams of coal worked as one mine by separate gangs of miners paid according to the weight of mineral gotten by them:—

Held, that the two seams together constituted a "mine" within the meaning of s. 13, and consequently that the miners working in one of the seams could not under that section appoint a check weigher in respect of the mineral gotten from that seam.

TRIAL of action at Leeds Assizes before Sutton J. without a jury. (1)

The plaintiff claimed, first, an injunction to restrain the defendant from acting as check weigher at the so-called Warren House mine of the Fryston colliery, near Castleford, and from preventing, or attempting to prevent, the plaintiff from acting in that capacity; and, secondly, a declaration that the plaintiff was

(1) The learned judge, having heard the evidence and the arguments of counsel on circuit, delivered judgment in London.

the duly appointed check weigher at and for the said Warren House mine.

By the statement of claim the plaintiff alleged that on September 23, 1907, at a meeting of the persons who were employed at the Warren House mine, and who were paid according to the weight of the mineral gotten by them, he was appointed check weigher by a majority of the persons entitled by the Coal Mines Regulations Acts, 1887 to 1905, to appoint a check weigher for the said mine, and that, the other requirements of these Acts having been complied with, he presented himself on several specified occasions at the weigh-box at the Warren House mine for the purpose of performing his duties, but that the defendant, who claimed to be the duly appointed check weigher, was already in occupation of the weigh-box and wrongfully prevented the plaintiff from entering the same, and that by reason thereof he was unable to act as check weigher of the Warren House mine.

By his defence the defendant alleged that the mine described in the statement of claim as the Warren House mine formed part of the Fryston colliery or mine, which included the Warren House seam and the Beeston seam; that prior to and since January 19, 1904, these seams had been worked as parts of the mine, and no notice under s. 19 of the Coal Mines Regulation Act, 1887, to work them separately had been given; that the so-called Warren House mine was the Warren House seam of the Fryston mine, and was not a separate mine within the meaning of the said Act of 1887; that the persons employed in that seam were not persons entitled within the meaning of that Act and the Coal Mines (Weighing of Minerals) Act, 1905, to appoint a check weigher; that the defendant and one Molyneux had been duly appointed check weighers, and the defendant claimed to be entitled, until his employment was duly determined, to act as check weigher; and that the plaintiff had not been duly appointed check weigher for the said mine.

At the trial it appeared that the men working in the Warren House seam had served notice on the defendant purporting to determine his appointment as check weigher and had appointed the plaintiff in his place; and the question was whether miners

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who were working in one seam of a mine had a right under s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887 (1), to appoint a check weigher in respect of the mineral gotten from that seam.

Tindal Atkinson, K.C., and *J. O. Andrews*, for the plaintiff.
Bairstow, K.C., for the defendant.

Cur. adv. vult.

June 27. SUTTON J. read the following judgment:—The Wheldale Coal Company, Limited, are the owners of two distinct collieries under different management and at some distance apart. The colliery to which this action relates is known as the Fryston colliery, at which two seams of coal were worked at the time when the present dispute arose. The upper and lower seams were respectively known as the Warren House seam and the Beeston seam, the latter being some hundreds of feet below the former. Up to October 16, 1902, the plaintiff and one Hopton were check weighers in respect of the Warren House seam. At that time the Beeston seam was not developed; the few men employed were paid by day, and not by the weight of the mineral gotten by them. In this state of things a strike took place, and both collieries were shut down until the following June. In June, 1903, the Beeston seam was first worked and later on the Warren House seam. In January, 1904, a meeting was held of the coal workers in both seams to elect two check weighers by ballot. At this meeting a man named Molyneux and the defendant were elected check weighers for both seams, and they acted as such until September 9, 1907, Molyneux acting mainly at the Beeston weigh-box and seldom at the Warren House weigh-box, and the defendant acting mainly at the Warren

(1) By the Coal Mines Regulation Act, 1887, s. 13, sub-s. 1: "The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check weigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be."

House weigh-box and seldom at the Beeston box. Notice of the defendant's appointment as check weigher was given to the colliery. The validity of the election was disputed, but I do not think it necessary to decide this in the view that I have taken of the principal dispute between the parties. On September 9, 1907, the coal getters in the Warren House seam gave the defendant notice to relinquish his office as check weigher a fortnight from that date. On September 23, 1907, the plaintiff was appointed by ballot check weigher for the Warren House seam by a large majority of the coal workers in that seam paid according to the weight of the coal gotten by them. During the period between January, 1904, and September, 1907, there was one check fund for both seams, the coal workers in each seam paid by weight for the coal gotten by them contributing to the fund sixpence each, which was deducted by the company from the wages payable to them: see s. 14, sub-s. 2, of the Coal Mines Regulation Act, 1887. On September 25, 1907, the number of coal workers contributing to this fund was 400 in respect of the Beeston seam and 120 in respect of the Warren House seam. During the same period, according to the evidence of the manager, the two seams were worked as one mine, it being impossible to divide them owing to the conditions imposed by the Act of 1887, so that a notice under s. 19 could not have been given. The main dispute between the parties is as to the meaning of the word "mine" as used in the Acts of 1887 and 1905, and in particular in s. 13 of the former Act, the plaintiff contending that the Warren House seam itself was a mine. I think that the word "mine" as used throughout the Acts of 1887 and 1905 includes the seams of coal which were in fact opened, whether one or more: see, among others, ss. 12, 14, 16, 19, 20, 34, 36, 38, 49 and 75. Assuming this to be correct, I think the word "mine" as used in s. 13 of the Act of 1887 must be used in the same sense. In a case like the present it may be desirable that the coal workers in one seam paid by the weight of the mineral gotten by them should have the right of electing a check weigher for that seam and that the similar coal workers in another seam should not have the right of voting at such election, but if so, an amendment of s. 13 is necessary. I think,

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therefore, that the plaintiff's case fails and that the defendant is entitled to judgment.

Judgment for defendant.

Solicitors for plaintiff: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitors for defendant: *Lees, Butterworth & McDonnell, for Charles Lowden, Pontefract.*

W. H. G.

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July 17.

[IN THE COURT OF APPEAL.]

DEWHURST *v.* MATHER.

Employer and Workman—Compensation—Casual Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a charwoman, who had been employed by the respondents on Fridays and alternate Tuesdays for a considerable period, met with an accident while working for them on one of the stated days. She came regularly to the respondents on those days without any special instructions. Upon an application for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the applicant was in the regular, and not casual, employment of the respondents, and made an award in her favour:—

Held, that it was not competent to the Court to interfere with this finding, there being ample evidence to support it.

APPEAL from an award of the Preston County Court judge under the Workmen's Compensation Act, 1906.

The applicant was a charwoman. On Tuesday, October 22, 1907, the applicant was engaged at the house of the respondents, Mr. and Mrs. Mather, washing clothes, and when cleaning up the cellar steps her left thumb was pricked by a pin. Blood poisoning set in as the result of the prick, and the applicant lost the use of her left hand in consequence and was permanently incapacitated. The applicant was employed by the respondents as charwoman on every Friday and every other Tuesday, and at the date of the accident she had been so employed for eighteen months. On other days she washed and cleaned for other people. The respondents disputed liability, upon the ground that the applicant was a casual employee only. The applicant stated

in her evidence that when she was not able to go to Mrs. Mather she let her know. That was when she was poorly. If she had her health she went regularly every Friday and every other Tuesday without being told to go each time. If other people had asked her to wash for them on the days on which she was engaged to Mrs. Mather she would not have gone.

The county court judge found that the applicant was in the regular employment of the respondents on every Friday and every other Tuesday, and that the accident occurred in the course of that employment, and he awarded the applicant 7*s.* a week.

The respondents appealed.

E. C. C. Firth, for the respondents. 1. The applicant is not a "workman" within the definition clause, s. 13, because there was no contract of service. Suppose the applicant had presented herself on one of the stated days and had been told that her services were not required, she would have had no remedy.

2. If there was a contract of service it was with the female respondent only. There is no evidence of any contract with the male respondent.

3. If there was a contract of service with both the respondents the applicant was a casual employee.

[COZENS-HARDY M.R. The county court judge has found as a fact that the applicant was in the regular employment of the respondent.]

It is a question of law what is the proper inference to be drawn from the facts: *Hill* v. *Begg*. (1) Assuming that the county court judge was right as to the nature of the employment, the amount of compensation is not disputed.

R. M. Montgomery, for the applicant.

COZENS-HARDY M.R. I think this is a reasonably plain case. The learned county court judge has held, first of all, that a wife who engages a person of this kind as a washerwoman does so as agent for her husband. It is quite clear that in a matter of that kind, although the actual engagement is made by the wife, it is

(1) Post, p. 802.

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made by her as agent for the husband, and the husband is liable. But then it is said that this washerwoman was not engaged under "a contract of service" within s. 13 of the Act. The evidence shews that she went on Friday every week and on alternate Tuesdays regularly, without any further instructions, and she went on other days of the week to other persons. Under these circumstances the learned judge has found, and I do not see how he could have failed to find, that there was a contract of service of a periodical nature. It seems to me to come exactly within the language of the First Schedule, clause 1, sub-s. 2 (*b*), which contains these words relating to the earnings of a workman: "Where the workman had entered into concurrent contracts of service with two or more employers, under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident." The Act obviously contemplates a case in which the engagement is not for the whole time, but for a portion of time with one employer and for a portion of time with another employer. That being so, it seems to me reasonably plain that this is not, to use the language of s. 13 of the Act, an employment of "a casual nature." It was an employment of a regular nature. It was for definite periods, perfectly well known to both employer and employee. Then it is said that this Court, in the recent case of *Hill* v. *Begg* (1), decided something which ought to govern this case. I was a party to that decision, and I do not desire to qualify anything I there said; but it seems to me to have nothing whatever to do with the present case. In that case there was no agreement between the parties for either permanent or periodical employment. Here the fact was found by the learned county court judge that there was an agreement for periodical employment. That being so, it is not an employment of a casual nature, and the decision of the learned county court judge was right. The appeal therefore fails and must be dismissed.

(1) Post, p. 802.

FARWELL L.J. I agree. The county court judge has found this question of regular employment, which is a question of fact, in favour of the applicant and upon evidence which is obviously sufficient to justify that finding. The applicant said, "If any one else had asked me to wash for them on the Friday or on every other Tuesday I was engaged to Mrs. Mather I would not have gone." Mrs. Mather is called, and she merely says, "Mrs. Dewhurst was engaged as a charwoman." If the applicant had presented herself at Mrs. Mather's house on the Friday and Mrs. Mather had told her that she did not want her and would not pay her, in my opinion she would have had a good cause of action.

KENNEDY L.J. I am of the same opinion. It appears to me that there was ample evidence to justify the finding of the county court judge that the applicant was employed by the respondents under an arrangement which provided that the employment, although periodical, was to be regular—that, to use the phrase of Buckley L.J. in *Hill* v. *Begg* (1), the employment, as well as being periodical, was stable; and if that is so, then this was not employment of a casual nature within the meaning of the Act.

Appeal dismissed.

Solicitors: *Mellor & Co., for Rawsthorn, Ambler & Booth, Preston; Busk, Mellor & Norris, for Backhouse, Blackburn.*

(1) Post, p. 802, at p. 806.

H. B. H.

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July 20, 21.

[IN THE COURT OF APPEAL.]

PAGE *v.* BURTWELL.

Employer and Workman—Compensation—Damages—Remedies against both Employer and Stranger—"Circumstances creating a Legal Liability"—"Proceedings"—"Recover" Compensation—Payments by Person other than the Employer—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6, *sub-s.* 1.

"Circumstances creating a legal liability" in s. 6 of the Workmen's Compensation Act, 1906, mean, not merely circumstances which in fact create a legal liability, but circumstances which are alleged to create a legal liability, which would be the foundation of an action for negligence.

The meaning of "proceedings" in s. 6, sub-s. 1, is not to be confined to legal proceedings actually taken, but is satisfied if a claim is made against some person other than the employer for negligence.

To "recover" compensation does not necessarily mean to recover by means of legal proceedings: it is sufficient if the workman has claimed compensation and received it.

A workman who had been injured in the course of his employment made a claim for compensation against a person other than his employer whom he alleged to be under liability for negligence, and received various payments in satisfaction of his claim without having resort to legal proceedings, though legal liability was not admitted:—

Held, that the workman was precluded by s. 6, sub-s. 1, from obtaining compensation from his employer under the Workmen's Compensation Act, 1906.

Appeal against the refusal of the judge of the county court of Ipswich, Suffolk, to award compensation to an applicant under the Workmen's Compensation Act, 1906, which raised a question on the construction of s. 6 of the Act, and particularly as to the proper interpretation to be given to the words "take proceedings" and "recover" compensation in sub-s. 1. (1) The facts, so far as material, were as follows:—

The applicant, George Page, was a wood-block floor layer. In

(1) Sect. 6 is as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

"(1.) The workman may take proceedings both against that person to recover damages and against any other person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation."

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December, 1907, the applicant was employed by one Ormston, a sub-contractor for the respondent, F. W. Burtwell, to relay some wood blocks on the premises of the British Xylonite Company, Limited, at their Brantham works, near Manningtree, Essex, and while so employed a concrete slab covering a trench gave way and the applicant fell through and twisted his knee and ankle, whereby he became incapacitated for work for about six months.

Shortly after the accident the British Xylonite Company, Limited, sent the applicant 2*l.*

On January 19, 1908, the applicant wrote to the company, referring to the 2*l.* as paid "on account" and asking whether they were "going to pay me for my lost time and accident."

On the following day the company wrote in reply: "We very much regret the injury you sustained while employed in our works as a workman of a sub-contractor. We are advised you are wrong in thinking you have no claim against your immediate employer or his head contractor, and that you should at once give notice of the accident to both, and claim compensation from them. We cannot accept any legal responsibility ourselves, and if you contend you have a legal claim on us we cannot of course assist you. We have purely out of good feeling and because you were injured in our works given you 2*l.*, and if you agree not to make any claim on us we shall be pleased for the same reason to pay your wages (less the one-half of them you are entitled to receive from your employer or his head contractor) for such reasonable time as you may be prevented from working, through the accident, and also to pay your doctor's bill."

On February 3, 1908, the applicant wrote to the company to tell them of his distress through being unable to work, "hoping you will keep your promise, which I will accept with thanks."

The company wrote in reply: "We understand your letter to mean that you make a claim against us. On that understanding we have pleasure in enclosing postal order for 3*l.* We have not had any bill from your doctor yet, but if he will send it we are prepared to pay any reasonable charge." The receipt of this letter and the money was duly acknowledged by the applicant. On February 13 the applicant's solicitor wrote to the company

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pointing out that the circumstances of the case seemed to shew a clear liability on the part of the company to compensate the workman, and he referred to the correspondence which had passed and the payments that had been made.

The company in reply denied legal liability, but added: "If no claim is made upon them they will be prepared to do as promised, viz., pay him the other half of his wages . . . . and his doctor's bill. Beyond this they cannot think of going."

Further correspondence took place between the applicant's and the company's solicitors, and on March 17, 1908, the applicant's solicitor wrote: "I have seen my client, and he authorizes me to consent to the terms and conditions of (the previous letter from the company's solicitor), viz., that the payment of 1*l.* is to cease as soon as he is fully able to resume his employment and that in no case is it to exceed six months."

As a fact, the company paid the applicant 1*l.* a week from the date of the accident until he was able to work. In May, 1908, the applicant commenced proceedings under the Workmen's Compensation Act, 1906, against F. W. Burtwell for compensation.

The county court judge held that the applicant had debarred himself under s. 6, sub-s. 1, from proceeding against the respondent Burtwell by receiving the payments made by the British Xylonite Company, Limited; but to avoid the expense of a new trial he found as a fact that the applicant was injured by an accident while in the employ of Burtwell, that the accident took place in or about the said employment, and that his average wages were 2*l.* a week; judgment, however, was given for the respondent Burtwell on the point of law.

The applicant appealed.

The appeal was heard on July 21.

Duncan, for the appellant. The gratuities that have been given to the appellant by a stranger do not prevent him from taking proceedings against his employer for compensation. "Legal liability" can only be determined by means of an action, and taking "proceedings" must mean taking legal proceedings under which he "recovers" either damages or compensation. A person

can only "recover" damages by means of an action. "Proceedings" in s. 6 means the same as "proceedings" under s. 1, sub-ss. 2 and 3: *Cribb* v. *Kynoch, Ld.* (*No.* 2). (1)

The decision in *Oliver* v. *Nautilus Steam Shipping Co.* (2) is in favour of the contention that the appellant is not precluded from obtaining compensation under the Workmen's Compensation Act. *Mulligan* v. *Dick & Son* (3), relied on by the county court judge, is distinguishable.

C. E. Jones, for the respondent, was not called upon.

COZENS-HARDY M.R. This case raises a question under s. 6 of the Act of 1906, and before dealing with the particular circumstances of the present case I think it well to call attention to the words of s. 6. It is as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." That must mean not merely if there are circumstances which in fact create a legal liability for negligence, but where there are circumstances which it is alleged create that liability, and which are the foundation of an action for negligence. Then it provides that the workman may take proceedings against that person to recover damages, and of course it cannot be ascertained whether there is a liability of that kind until after the action has been commenced and brought to trial; and that confirms, as it seems to me, conclusively the interpretation I put on the earlier words. Sub-s. 1 says, "the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation." Now as I read that, the meaning is this. A workman has, or asserts he has, a right against his own employer for compensation under the Workmen's Compensation Act—he has, or asserts he has, a right against somebody, not his employer, based upon negligence; he is not bound to exercise his option in the first instance, as was the case under the Act of 1897, but he may, if so

(1) Ante, p. 551. (2) [1903] 2 K. B. 639.
(3) (1903) 41 Sc. L. R. 77.

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minded, take proceedings concurrently, but if he recovers damages he cannot get compensation, and if he recovers compensation he cannot get damages. I am not prepared to assent to the view that this section is meaningless unless there has been a legal proceeding actually commenced against a person who is not the employer. It seems to me that the section ought to be construed as operative in the case where a claim is made by the man against a person who is not his employer for negligence, under which claim compensation in the nature of damages—not damages—is paid by that person without any writ issued, and upon terms that no writ should issue. I decline to limit the word "recover" to recover by virtue of legal proceedings. I think, to take the language of Vaughan Williams L.J. in *Oliver* v. *Nautilus Steam Shipping Co.* (1), "if there is a payment and a receipt of money under the Workmen's Compensation Act, and that receipt is in no way qualified, I think that is sufficient to bring the case within the operation of s. 6 and put the workman in the position of having proceeded against his employer for compensation, and recovered it." So much for the section.

[After stating the facts and reading the material portions of the correspondence as set out above, the Master of the Rolls continued :—] The result was a plain offer made and a plain offer accepted, and that after demand had been made upon the company, or an assertion (denied by the company, but an assertion, nevertheless) that they were clearly liable to the applicant for damages for injuries which he had sustained. Under the circumstances it seems to me that it is a case which falls within s. 6, sub-s. 1. The applicant has recovered damages from the British Xylonite Company; he is not entitled to recover compensation from his employer. That being so, I think the learned judge was right, and in my opinion the appeal must be dismissed.

FARWELL L.J. I am of the same opinion, and I desire to add only a few words. Under the Act of 1897 there was an option given either to issue a writ or to commence proceedings for

(1) [1903] 2 K. B. 639, at p. 650.

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compensation; this option was finally determined by the issue of the writ or the commencement of the proceedings. The new Act (s. 6, sub-s. 1) gives the workman a right both to take proceedings and to claim compensation, or to carry on both subject to the qualification that he shall not be entitled to recover both damages and compensation. I entirely agree with the Master of the Rolls in his construction of the Act. It has been said by Lord Halsbury and other Lords in the House of Lords that one of the great objects of this Act was to avoid litigation and keep the workmen out of the Courts; but we are asked to put a construction upon this sub-section which would render litigation to the bitter end inevitable. Now "creating a legal liability" cannot mean that the Court has to determine judicially that there was a legal liability before the section can apply; for that would involve one of two things—either that the workman must litigate up to judgment against a third person to see if he is legally liable, or that the Court must determine the liability of a third person not before it, as if an action were brought against him. Therefore the section refers, in my opinion, to a prima facie case of legal liability, something that is not pure bounty, but a prima facie case of liability, which although not acknowledged is yet discharged by the payment of money. That in a sense is tantamount to a payment into Court with denial of liability. Here, on the letters that have been read, I cannot doubt there was at any rate an arguable case of liability on the part of the company. The claims were put forward by the workman, and they were compromised on the terms of his receiving a certain sum. That being so, the question is whether he has "recovered." I am of opinion that he has, in that he has received. That is the common sense of it. The workman is not to have it twice over. In my opinion this appeal fails.

KENNEDY L.J. I am of the same opinion. Under the prior Act there was an option, an option not necessarily determined by the actual commencement of legal proceedings in either case, for it has been held that the workman, having issued a writ in an action, might discontinue those proceedings and take up his other remedy for obtaining compensation under the Act, but an option

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which, in my view, ought to be taken to have been finally exercised where he has pressed to a decision and obtained one. Under this section there is no longer a case of option before the workman. He is entitled to take proceedings, that is, to take legal proceedings, against both of the persons whom he may think he has claims against, the one as employer under the Act, the other as a third person who has by the negligence of himself or his servant given good ground, in the workman's opinion, for a claim for damages for negligence. Now that is the first half of the section. There is the liberty to pursue concurrent proceedings. But the section says at its close, "He shall not be entitled to recover both damages and compensation"; and it appears to me a narrow and unjustifiable view to hold that "recover" means recover in the course of and as the result of some litigious proceedings. It is not so in the Act. It is not "recover in such proceedings," but "recover," and "recover," it appears to me, bears the meaning which was put upon that word by Vaughan Williams L.J. in the case of *Oliver* v. *Nautilus Steam Shipping Co.* (1), "applied for and received." The workman did in this case "apply for and receive" damages. As to that I do not think the correspondence leaves one in doubt. In *Oliver* v. *Nautilus Steam Shipping Co.* (1) there was a receipt of some payment, but the receipt from the first was expressly "without prejudice," and the Court held that, although those words were omitted in the later receipts, the words "without prejudice" governed all the receipts from the first. But the opinion expressed by the Lord Justice to which I have referred appears to me to be right. The Court in that case came to its conclusion on account of the particular form of the receipt expressing the arrangement under which the money was received. Here I am not going through the correspondence, the important letters of which have been already discussed by the Master of the Rolls in his judgment. All I have to say is that it is plain to me from the beginning there was a claim made, a claim submitted to, although with that sort of reservation on the part of the payer which would have been expressed, had there been an action, in the form of a payment into Court without

(1) [1903] 2 K. B. 639.

admission of liability; but it is none the less true that these payments from this company to the appellant have been received, and received in satisfaction of a claim on his part, without an express admission of liability on the part of the company. In my opinion this decision is perfectly right and the appeal must be dismissed.

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Appeal dismissed.

Solicitors: *G. A. Whigham; Surridge & Mullis.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A. 1908 *July* 6, 7.

NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY, LONDON AND NORTH WESTERN RAILWAY COMPANY, GREAT WESTERN RAILWAY COMPANY, AND SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

Railway—Regulation—Increase of Rates—Reasonableness—Change in Condition of Trade—Evidence—Railway and Canal Traffic Act, 1894 (57 & 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

Upon a complaint that an increase of a rate for the carriage of coal as from August 1, 1900, over the defendants' railways was unreasonable, an order was made that, if the defendants relied for justification on any change in the mode or expense of carrying coal, they were to give particulars thereof. No such particulars were given. At the hearing before the Railway Commissioners it was proved on behalf of the defendants that in 1895, at the request of the colliery owners, owing to the depression in the coal trade, the defendants reduced the rates for the carriage of coal; that in 1900 the coal trade was in a prosperous condition, the price of coal having risen considerably; and that on August 1, 1900, the defendants raised the rates to what they had been in 1895 before the reduction was made. The Commissioners (Sir James

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NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RAILWAY, LONDON AND NORTH WESTERN RAILWAY, GREAT WESTERN RAILWAY, AND SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

Woodhouse dissenting) having found that the increase of the rates was reasonable :—

Held, that the evidence as to the rise in the price of coal was not given for the purpose of proving an increase in the expense of carrying the coal, but for the purpose of proving that the depression which was the cause of the reduction in the rates had passed away and had been succeeded by a period of prosperity; and therefore the evidence was not excluded by the order for particulars; and that, consequently, there was evidence upon which the Railway Commissioners were entitled to find that the increase of the rates was reasonable.

Judgment of the Railway and Canal Commission, [1908] 1 K. B. 771, affirmed.

APPEAL from the decision of the Railway and Canal Commissioners (1) upon an application by the North Staffordshire Colliery Owners' Association complaining that the defendant railway companies had jointly with one another increased as from August 1, 1900, certain rates for the carriage of coal and coke from five collieries in North Staffordshire to Ellesmere Port and Birkenhead.

The defendants, by their answers to the application, alleged that the increase of the rates was reasonable; and they further raised as a question of law the contention that, as the rates after the increase of August 1, 1900, were no higher than those which were in force between the same places on December 31, 1892, they had not "since the last day of December, 1892, directly or indirectly increased" the rates within the meaning of s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894. Upon this point of law, which was ordered to be set down for hearing before the trial, the decision of the Court of Appeal was against the defendants. (2) The question therefore remained whether the increase of the rates on August 1, 1900, was reasonable.

On April 30, 1907, before the case came on for hearing before the Railway and Canal Commissioners, the following order was made upon an application by the applicants for leave to administer interrogatories to the defendants :—"This Court doth not think fit to make any order for interrogatories, but by consent doth order that, if the defendants rely for justification

(1) [1908] 1 K. B. 771. (2) [1907] 2 K. B. 191.

on any change in mode or expense of carrying coal, they are to give to the applicants by the 29th of June, 1907, particulars of the same with copies of any figures on which they rely." The defendants gave no such particulars.

At the hearing the defendants called two witnesses, one being the general manager of the North Staffordshire Railway Company, and the other being an official of the London and North Western Railway Company. The applicants called no evidence. The facts which were proved were shortly these: In 1895 great depression prevailed in the coal trade, and in consequence thereof the defendant railway companies, at the earnest request of the colliery owners, reduced the rates (which had stood at the same figure since before December 31, 1892) about 2*d.* per ton for the carriage of coal from the collieries in question to certain ports on the Mersey, including Ellesmere Port and Birkenhead. In 1900, during the South African war, the coal trade was in a flourishing condition, there being, as the witnesses said, a great "boom" in everything, including coal. The price of coal largely increased, and on August 1, 1900, the railway companies raised the rates substantially to what they had been in 1895 before the reduction was made. In 1904 some of the rates, but not those to Ellesmere Port and Birkenhead, were again reduced. The witnesses gave evidence as to the price which the railway companies paid for locomotive coal, namely, 6*s.* 9*d.* a ton in 1895, 14*s.* 3*d.* a ton in 1900, and 11*s.* a ton at the date of the hearing before the Railway Commissioners. This evidence was objected to on behalf of the applicants upon the ground that, as no particulars had been given by the defendants under the order of April 30, 1907, as to any change in the mode or expense of carrying the coal, the evidence was not admissible. The evidence was admitted.

The Railway Commissioners held that the question whether an increase in a rate was reasonable depended upon the circumstances existing at the time the increase was made, and they came to the conclusion (Sir James Woodhouse dissenting) that the defendants had shewn that the increase was reasonable. (1)

The applicants appealed.

(1) [1908] 1 K. B. 771.

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Balfour Browne, K.C., and *Rowland Whitehead*, for the applicants. (1) There was no evidence which was properly admissible before the Railway Commissioners which would justify them in coming to the conclusion that the increase of the rates in 1900 was reasonable within the meaning of s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894. The order for particulars, dated April 30, 1907, precluded the defendants from giving evidence as to any change in the mode or expense of carrying coal unless they gave particulars thereof. The defendants gave no particulars under the order, and therefore the evidence which they relied upon was not admissible. The evidence given on behalf of the defendants was directed solely to shewing that there was a great rise in the price of coal and consequent increase of expense to them. That class of evidence was clearly shut out by the order. The two witnesses who were called on behalf of the defendants gave evidence as to the price which they had to pay for coal in 1895 and 1900 respectively. That evidence was directed to an increase in the cost of carrying the coal, and it would have been relevant, if the defendants had given particulars under the order, for the purpose of shewing that in one particular item the cost of carriage had increased. If the defendants had placed themselves in a position to give that evidence by complying with the order, the applicants might have met it by shewing that the increased price of coal did not affect the railway companies in August, 1900, because they had contracts for coal which were made at a time when coal was cheap and which extended over a considerable period and included the date in question. They might also have shewn that in some of the other items which went to make up the cost of carriage there was a decrease of expense. A mere general statement that there was, as it was called, a "boom" in the coal trade in 1900 was not a sufficient reason for asking the coal trade to pay more for the carriage of coal. The defendants would have to shew increased expense of

(1) The applicants did not question, upon the appeal, the correctness of the decision of the Railway and Canal Commission that the reasonableness of the increase of the rates must be determined by the circumstances existing at the time when the increase was made.

carrying coal, and any such evidence was shut out by the defendants not having given particulars of the expense as required by the order. The Railway Commissioners, as appears from their judgments, understood the evidence to be directed to the question of increased working expenses to the railway companies. The fact that the defendants may have reduced their rates to meet a bad state of trade would not justify them some years afterwards in raising the rates, unless they could shew that such an increase was itself reasonable. That is not a relevant consideration. The collieries may not, when the rates are raised, be owned by the same persons as had the benefit of the reduction. The decision of the Court below ought therefore to be set aside.

[VAUGHAN WILLIAMS L.J. If evidence has been wrongly admitted, is not our proper course to order a new trial?]

The Court has power to order a new trial, as the rule of the Supreme Court of April 10, 1889, made Order LVIII. of the Rules of the Supreme Court, 1883, applicable to all appeals from the Commissioners under the Railway and Canal Traffic Act, 1888, and r. 5 of Order LVIII. gives the Court of Appeal power to order a new trial.

Sir R. B. Finlay, K.C., and *Joseph Shaw*, for the North Staffordshire Railway Company. There is evidence upon which the Railway Commissioners were entitled to find that the increase of the rates on August 1, 1900, was reasonable, and that evidence was properly admitted. The evidence was not directed towards shewing that there was a change in the mode or expense of carrying the coal. The principle within which the defendants seek to bring the case is that stated by Fletcher Moulton L.J., who said, when the preliminary point in the present case was before this Court (1), that "it might well be open to the railway company to shew that the increase of the charge was reasonable by shewing that the previous reduction had been found to be too great, or that it was made under circumstances which no longer existed." The evidence here was called to shew that the reduction of the rates was made in 1895 under special circumstances, and that those special

(1) [1907] 2 K. B. 191, at p. 210.

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circumstances had passed away in 1900, when the rates were restored to their former level. The evidence given by the two witnesses called on behalf of the defendants went to shew that the reduction of the rates was made at the urgent request of the colliery owners on account of the bad state of the coal trade; that in 1900 the coal trade was in a most prosperous condition, and that the price of coal rose considerably and every expense went up against the railway companies. The evidence given as to the prices paid by the railway companies for coal in those two years was not given upon any question of increased cost of carriage in the latter year, but for the purpose of shewing that the depression of 1895 had quite passed away and was succeeded by a period of great prosperity in 1900, and it was so used by A. T. Lawrence J. and Mr. Gathorne-Hardy, though there may be one or two passages in their judgments which refer to the higher price which the railway companies had to pay for their coal in 1900. It was admitted on behalf of the applicants in the Court below that no fact was in dispute, and therefore the evidence must be taken as true. The evidence was therefore properly admitted, and the Railway Commissioners were entitled to come to the conclusion that the defendants had discharged the onus which was upon them of shewing that the increase of the rates was reasonable.

Cripps, K.C. (*Simon, K.C.*, and *Joseph Shaw* with him), for the London and North Western Railway Company. In order to justify an increase of a rate founded upon increased cost of carriage, elaborate tables, giving the various items of cost making up the total rate, are usually given, as, for instance, in the case of *Smith & Forrest* v. *London and North Western Ry. Co.* (1) The order of April 30, 1907, dealt with a case of that sort, and it provided that, if the defendants relied upon any such detailed items, they should, before the hearing, give the applicants particulars thereof. The defendants did not attempt to go into any details of cost, and the evidence went solely towards the changed condition of the coal trade, of which the price of coal was an important index. The evidence was therefore not excluded by the order, and, that being so, it was a question of

(1) (1900) 11 Ry. & Ca. Tr. Cas. 156.

fact whether upon that evidence the increase of the rates was justified.

Harold Russell, for the Great Western Railway Company.

Rowland Whitehead, in reply. It is clear from the judgments of the Commissioners that they considered that the defendants were relying upon an increase in the expense of carriage. The fact that there was a change in the condition of the coal trade between 1895 and 1900, whereby the colliery owners were in a better position to pay the higher rates, is an irrelevant consideration. The reasonableness of the rate is not to be tried by its effect upon the trade of the persons who have to pay it: *Rickett, Smith & Co.* v. *Midland Ry. Co.* (1) ; *Black & Sons* v. *Caledonian Ry. Co.* (2) The evidence shewed a mere temporary change in 1900 which would not justify the increase of the rates. The evidence, therefore, if it was given to shew that there was a change in the condition of the trade, was not a sufficient ground to entitle the Railway Commissioners to hold that the increase of the rates was reasonable.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. The question which has been argued before us arises on s. 1 of the Railway and Canal Traffic Act, 1894, which provides that "where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." When the matter came before the Railway Commissioners the majority came to the conclusion that the railway companies had proved that the increase in the rates complained of was reasonable. I have no doubt that the majority of the Court—A. T. Lawrence J. and Mr. Gathorne-Hardy—included as one of

(1) [1896] 1 Q. B. 260, at p. 266; 9 Ry. & Ca. Tr. Cas. 107, at p. 114.

(2) (1901) 11 Ry. & Ca. Tr. Cas. 176, at p. 180.

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the grounds, and perhaps the main ground, of their decision the fact that in 1895 the railway companies, in consequence of the depression which then prevailed in the coal trade, made, at the earnest request of the colliery owners, a reduction in the rates for the carriage of coal, thereby very probably causing the railway companies to carry the coal at a very low rate of profit; and that in 1900 the depression, which was the ground of the concession by the railway companies in 1895, had passed away, and had been succeeded by a very prosperous condition of the coal trade. Counsel for the applicants contended before us that the railway companies, both by their pleadings and also by the evidence which they called, relied upon another and a different ground as justifying the increase of the rates, namely, the increased expense to the railway companies of the carriage of coal in 1900 as compared with 1895, owing to the increased price which they had to pay for their locomotive coal. No doubt, to a certain extent, A. T. Lawrence J. and Mr. Gathorne-Hardy do mention in their judgments the fact of the increased expense in 1900 of the carriage of coal by the railway companies. Upon that it was contended on behalf of the applicants that, in consequence of an order for particulars made by consent on April 30, 1907, the evidence of the increased expense in the carriage of coal ought not to have been admitted by the Commissioners, and that, if that evidence was excluded, there was no evidence upon which the Commissioners could come to the conclusion that the increase in the rates was reasonable. That order for particulars was made upon an application by the applicants for leave to administer interrogatories to the railway companies, and it was as follows: "This Court doth not think fit to make any order for interrogatories, but by consent doth order that, if the defendants rely for justification on any change in mode or expense of carrying coal, they are to give to the applicants by the 29th of June, 1907, particulars of the same with copies of any figures on which they rely." It was said that, though no particulars had been given in compliance with that order, the railway companies really relied upon change in the mode or expense of carrying coal as their justification for increasing the rates.

Now the answer given by the railway companies to that

contention is that the applicants are mistaken in supposing that the evidence which was in fact given by the railway companies was evidence which fell within the scope of the order properly construed. It was said that the order was only intended to apply to cases which have often arisen upon the question of the reasonableness of an increase of a rate, namely, those cases which involve lengthy tables of figures setting out the various items of the expenditure of the railway company in the performance of the particular service for which the rate is charged. I do not myself think that it is a matter of any great importance to say what is the exact construction to be placed upon the order. A. T. Lawrence J. in his judgment (1) says: "Mr. Balfour Browne contended very strenuously that such considerations could not be admitted to have any influence, because the railway companies had not given particulars pursuant to an order for particulars made in the matter of this complaint. I think this view presses technicality beyond the limits of reason. The order of this Court contemplated particulars, if details of cost or other such matters were to be adduced in proof of the reasonableness of the increase of 1900. The general considerations to which the evidence for the railway companies was directed could take neither colliery owners nor counsel by surprise. They were indeed largely matters of common knowledge. I think that the railway companies have successfully discharged the onus of proof, and, as the applicants have given no evidence themselves, I come to the conclusion upon the evidence now before me that the increase of these rates was reasonable." Mr. Gathorne-Hardy says (2): "With regard to our order for particulars, I do not think that it was intended to have the wide operation contended for by Mr. Balfour Browne, and I do not think that the applicants were in any way surprised or taken at a disadvantage by the course taken at the hearing. On the whole, therefore, I agree that the defendants have satisfied the onus laid upon them, and have justified the increase of the rate." Though, as I have said, I do not think it is a matter of importance to say what is the exact construction to be placed upon the order, still, speaking for myself, I am inclined to think that the

(1) [1908] 1 K. B. at p. 777. (2) [1908] 1 K. B. at p. 779.

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construction placed upon it by A. T. Lawrence J. and Mr. Gathorne-Hardy is the right one. The reason why I say that it is of no great importance which of those two constructions of the order is adopted is this. The learned counsel who examined the witnesses on behalf of the railway companies was very careful in his questions, and the witnesses were very careful in their answers, to keep within the lines of what they knew to be the companies' real case, though the learned judge did interpose one or two questions which might seem to indicate that the question of increased expense was being set up by the railway companies. One must, however, look at the substance of the evidence, and it seems to me to be quite plain from the transcript of the shorthand notes of the evidence that the general manager of the North Staffordshire Railway Company was not really giving any evidence of any change in the mode or expense to the railway companies of carrying the coal. What he was insisting upon was that the depression in the coal trade of 1895 had disappeared, and that a time of prosperity had come to the colliery owners in 1900. It is true that A. T. Lawrence J. does in one part of the evidence deal with the matter as if the witness was giving the prices paid for locomotive coal in 1900 as evidence of the increased expense to the railway companies of carrying the coal, but that was, to my mind, not what the witness intended to do at all. The counsel for the applicants expressly stated that there was no fact in dispute, and I cannot think that they took the view that the railway companies sought to justify the increase in the rates in 1900 by the increased expense of carrying the coal. We know from what has taken place before us that the applicants do not deny that in 1900, when the increase in the rates was made, the coal trade was in a prosperous condition, and colliery owners were able to obtain good prices in the market for their coal; but they said that it was only a temporary "boom," if that is the right word to use, and not an improvement of a permanent character; and they said further that, if it was a question of increased expense to the railway companies in carrying the coal, they did not admit that there was at that date any such increased expense, inasmuch as they might have shewn that at that time the railway companies were not affected by the rise in price

of which evidence was given by reason of their having contracts for coal made before the rise in price took place and extending over a length of time sufficient to cover the period in question.

Now I ought to point out here what it is that is admitted by the applicants. In the course of the argument before us counsel for the applicants stated, in answer to a question from me, that they did not contest the accuracy of the passage in the judgment of A. T. Lawrence J. (1) which amounts in substance to this: that in 1895 a reduction was made in the rates for the carriage of coal as a concession to the colliery owners at a time of great depression in the coal trade—a concession which was accepted by the colliery owners as a liberal concession made by the railway companies in view of the depression which then existed; that matters had changed since 1895, and that in 1900 the coal trade was prosperous again. When the judgments of A. T. Lawrence J. and Mr. Gathorne-Hardy are read, I think it is true to say that the basis of those judgments is the change which occurred between 1895 and 1900, whereby the depression of the former year, which was the cause of the reduction in the rates for the carriage of the coal, gave place to an era of prosperity in 1900. I am quite aware that there are passages in those judgments which shew that they were not entirely forgetting that one of the consequences of the improvement in the condition of the coal trade was that prices rose, and that high prices affected every one who had to use coal, including the railway companies. The passage in the judgment of A. T. Lawrence J. to which I refer is this (1): "The expenses of the railway companies were at that time (1895) exceptionally low—for example, they were paying for locomotive coal only 6*s.* 9*d.* per ton. In the year 1900, when the rates were raised, the circumstances were wholly different. The South African war was proceeding. The cost of everything in connection with railway working had largely increased, and the price of locomotive coal had risen to 14*s.* 3*d.* per ton." That however, though perfectly true, is in no sense the ground of the judgment. Mr. Gathorne-Hardy (2) says: "It was essentially reasonable that, when the railway companies were obtaining the benefit of an exceptionally

(1) [1908] 1 K. B. 771, at p. 776. (2) [1908] 1 K. B. 771, at p. 778.

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cheap supply of coal, with the consequent reduction of their working expenses, they should be ready to comply with such an appeal. It seems to me to follow that the parties ought to have contemplated a return to the old rate when the special reason ceased"—that is, when the depression ceased—"and that in 1900, the time of the Boer war, when the mines were as prosperous as they were depressed at the time of the reduction, and the companies were paying an inflated price for coal, it was essentially reasonable for the companies to revert to a figure approximating to the original rate." We cannot in any sense review the judgment of the Railway Commissioners upon a question of fact, and I am not referring to these passages from the judgments as bearing in any way upon any question of fact which had to be determined by the Commissioners. I am only referring to them to shew what was the basis of their judgment. In my opinion the basis of the judgment was that it was reasonable that the railway companies, when the depression, which was the cause of the reduction of rates in 1895, had disappeared, should in the prosperous period of 1900 revert to the original rates which had been charged before the reduction was made in 1895. It is not denied that, if that is the ground of the decision, there is ample evidence to support it. In my judgment the case put forward by the railway companies was not based upon any ground which is covered by the order for particulars so as to debar them from giving the evidence which they gave. They did not tender that evidence in support of any case based on change of mode or expense of carrying coal, and therefore there is no ground for a new trial, though at one time, before I properly understood the true bearing of the evidence, I was inclined to think that it came within the order for particulars, and that on that ground there should be a new trial. I have come to the conclusion that the evidence is not directed to that question at all, and, therefore, for the reasons I have given the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. When the appeal on the preliminary point came before this Court (1)

(1) [1907] 2 K. B. 191.

the question was whether s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, related to all increases of rates made subsequently to December 31, 1892, or whether it only related to an increase of rates beyond those in force on December 31, 1892. We decided that the Act applied to all increases made subsequently to December 31, 1892. One of the arguments urged most vigorously by the railway companies against that interpretation of the Act was that it would act as a deterrent to their making reductions in rates, inasmuch as they would have, after making a reduction, to justify any subsequent increase upon that lower charge, and that therefore they would be more likely to maintain a rate even under circumstances in which it was no longer justified. In my judgment on that occasion I pointed out (1) that there did not seem to me to be so much force in that contention as the companies thought, "because, in my opinion, the sub-section does not limit in any way the mode of justifying the increase, and it might well be open to the railway company to shew that the increase of the charge was reasonable by shewing that the previous reduction had been found to be too great, or that it was made under circumstances which no longer existed." I adhere to that view, and I think that the case which is made by the railway companies upon this application is precisely a case of the latter kind. Their answer to the complaint is that they reduced the rates in 1895 solely to meet the then existing distress in the coal trade, which made it very hard for the collieries to continue working; that that state of things had entirely passed away in 1900, and had been succeeded by a period of prosperity; and that therefore they were justified in going back to the rates which obtained in 1895 before the reduction was made.

Now the evidence given on behalf of the railway companies was met by no counter evidence on behalf of the applicants. In fact, the leading counsel for the applicants accepted it by saying that there was no fact in dispute. That evidence abundantly supports the case which the railway companies have put forward. It shews that the companies agreed to lower the rates solely on account of the distress in the coal trade in 1895, and it shews

(1) [1907] 2 K. B. at p. 210.

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also that the whole of the circumstances which led to the reduction in the rates in 1895 had passed away in 1900, indeed had so completely passed away that they were succeeded by what has been termed a "boom" in the coal trade. Upon that evidence the Railway Commissioners, in my opinion, were fully justified in finding that the case which was put forward by the railway companies was proved, and in dismissing the application.

The only point in the case that has given rise to any difficulty is the following: there was another possible way of justifying the increase of the rates in 1900, namely, by shewing an increased cost to the railway companies of the carriage of the coal. Now a justification of an increase of rates on account of increase of cost of carriage must be supported by detailed evidence of a very voluminous character. The elements of cost to a railway company in the case of carriage of goods or minerals are very complicated, and, if the railway companies were going to put forward such a case as that, it was clearly right that the applicants should, before the hearing came on, be put in possession of the figures upon which the railway companies were going to rely in support of their case, so that the applicants might have time to consider them and an opportunity of calling such evidence as they thought proper to rebut or qualify them. Accordingly an order was made by consent that, if justification on account of increased cost of carriage was relied upon by the railway companies, such particulars should be given. No particulars were given, and I think that the railway companies were shut out from justifying the increase of the rates on the ground of increase of cost of carriage. But I do not think that they put forward any case of justification on that ground. The only fragment of evidence bearing upon it was a statement as to the price of coal at two or three relevant dates, that is to say, a statement with regard to one only of a large number of components in the cost of carriage. In my opinion, therefore, the railway companies did not set up the case that the increase of the rates could be justified by a change in the mode or expense of the carriage of the coal, and, although there are one or two remarks in the judgments both of A. T. Lawrence J. and of Mr. Gathorne-Hardy as to the prices which the railway

companies were paying for locomotive coal, I do not think that the evidence was directed to a case of justification upon that ground, nor do I think that the Railway Commissioners intended to or did decide the question upon that ground. When I look carefully at what happened at the hearing I cannot help coming to the conclusion that all parties realized that the justification set up was that there had been a previous reduction made under special circumstances which had entirely passed away. That case was proved, and it is sufficient to support the decision of the Railway Commissioners. The appeal must therefore be dismissed.

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BUCKLEY L.J. I am of the same opinion. Notwithstanding the order of April 30, 1907, we are not, I think, driven to say that the Railway Commissioners admitted and acted upon evidence which they ought to have excluded. For some time I was disposed to think that we ought to order a new trial, but I am glad to concur in the opinion that, for the reasons given by the other members of the Court, it is not necessary to do so.

Appeal dismissed; one set of costs only to be allowed to the defendants.

Solicitor for applicants: *M. A. Orgill, for J. H. Knight, Newcastle-under-Lyme.*

Solicitors for North Staffordshire Railway Company: *Burchells.*

Solicitor for London and North Western Railway Company: *C. de J. Andrewes.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

E. L.

C. A.

1908

July 15.

[IN THE COURT OF APPEAL.]

BROOK *v.* MELTHAM URBAN DISTRICT COUNCIL.

Local Government—Sewer—Facilities for carrying off Liquids from Factories —Rivers Pollution Prevention Act, 1876 (*39 & 40 Vict. c.* 75), *s.* 7.

By s. 7 of the Rivers Pollution Prevention Act, 1876, "every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers . . . . provided . . . . that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district":—

Held, reversing the judgment of a Divisional Court (ante, p. 341), that the word "sewers" in the proviso to the section refers, not only to the pipes in which the sewage is received, but to the whole sewage system of the authority.

Guthrie & Co. v. *Brechin Magistrates*, (1888) 15 R. 385, not followed.

Appeal from the judgment of a Divisional Court (Channell and Sutton JJ.) upon an appeal from the Huddersfield County Court.

The action in the county court was brought by manufacturers against an urban district council under s. 10 of the Rivers Pollution Prevention Act, 1876, to compel the defendants to give to the plaintiffs facilities for enabling them to carry liquids proceeding from their factory to the extent of 65,000 gallons into the defendants' sewers under s. 7 of the Act. It appeared that the defendants' sewer pipes were of sufficient capacity to carry the amount of liquid which the plaintiffs proposed to discharge into them, in addition to the ordinary sewage of the district, but their works for the purification of the sewage were not sufficient to deal therewith.

The county court judge was of opinion that the word "sewers" in the proviso to s. 7 included not only the pipes for carrying the sewage, but the whole sewage system of the local authority, and that, as the defendants' sewage system as a whole was only sufficient for the requirements of their district, they were under no obligation to afford to the plaintiffs the facilities demanded by

them. He accordingly dismissed the action. The facts are fully stated in the report of the case in the Court below. (1)

The Divisional Court reversed his decision.

Scott Fox, K.C., and *Lowenthal* (*Theobald Mathew* with them), for the defendants. Having regard to the general scope of the Rivers Pollution Prevention Act, 1876, and the obvious intention of the Legislature as shewn in the provisoes to s. 7, the word "sewers" in the second proviso ought to be construed as meaning the whole sewage system of the local authority, by which the sewage is conveyed to and discharged into the river in a proper state, and not the mere pipes in which the sewage is conveyed. It would be absurd to exonerate the authority from giving the facilities mentioned in the section where the capacity of the "sewers," in the ordinary sense of the word, is only sufficient for the wants of the district, but to leave them liable to give such facilities, although the means of disposing of the sewage is only sufficient for those wants. The observations of Lord Halsbury L.C. in *Pdsmore* v. *Oswaldtwistle Urban District Council* (2) clearly shew that in his opinion the word "sewers" in the proviso to s. 7 means the whole sewage system of the local authority. *Guthrie & Co.* v. *Brechin Magistrates* (3), upon the authority of which the Court below decided the case, is not binding on this Court. The Lord President in that case seems to have based his decision on the view that there was a common law obligation on a burgh in Scotland to drain itself, and further that under the Public Health (Scotland) Act, 1867, s. 77, manufacturers had an absolute right to use the sewers for the discharge of their refuse. However that may be in Scotland, it is submitted that neither the common law nor the Public Health Act, 1875, s. 21, confers any such right on manufacturers in England. In that case the sewage appears to have been disposed of upon a sewage farm and not treated in pipes or channels as in the present case. It might be difficult to say that a sewage farm could be included in the word "sewers." Therefore that case is distinguishable.

(1) Ante, p. 341.

(2) [1898] A. C. 387, at p. 396.

(3) 15 R. 385

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The case of *Eastwood Brothers* v. *Honley Urban Council* (1) is really no authority upon the point raised in this case. [They also cited *Robinson* v. *Workington Corporation* (2); *Attorney-General* v. *Clerkenwell Vestry* (3); *Graham* v. *Wroughton* (4); *Kinson Pottery Co.* v. *Poole Corporation.* (5)]

T. E. Ellison (*Danckwerts, K.C.*, with him), for the plaintiffs. In its natural meaning the word "sewers" signifies the pipes by which sewage is conveyed to the place where it is to be disposed of, and does not include the works or apparatus by which that disposal is effected. In the present case no doubt the purification of the sewage was to some extent effected in pipes, but in many cases it would be effected on a sewage farm, or the sewage would be treated in tanks. Such a farm or such tanks could not be treated as covered by the word "sewers." The word "sewers," as used in the first part of the section, can only refer to the sewers proper, i.e., the pipes by which the sewage is carried to the disposal works. It would be a very strong thing to say that it can be construed in different senses in the same section. All through the provisions of the Public Health Act, 1875, with regard to sewerage, there is a clear distinction made between the sewers and the works by which the disposal of the sewage carried by them is effected. Under s. 21 of that Act manufacturers had the right of discharging their refuse into the public sewers, subject to the condition of complying with the authority's requirements as to the mode of connection. The case of *Guthrie & Co.* v. *Brechin Magistrates* (6), in the Court of Session in Scotland, though not, strictly speaking, binding on this Court, is a strong authority for construing the word "sewers" in the proviso to s. 7 of the Act of 1876 in its natural sense. In *Eastwood Brothers* v. *Honley Urban Council* (1) the judgment of Rigby L.J. clearly shews that in his opinion the word "sewers" is used in the proviso to s. 7 in its natural sense. The observations of Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (7), upon which the

(1) [1901] 1 Ch. 645.
(2) [1897] 1 Q. B. 619.
(3) [1891] 3 Ch. 527.
(4) [1901] 2 Ch. 451.
(5) [1899] 2 Q. B. 41.
(6) 15 R. 385.
(7) [1898] A. C. 387.

defendants rely, were merely obiter, the ground of the decision being that the remedy by mandamus was inapplicable. [He also cited *King's College, Cambridge* v. *Uxbridge Rural District Council* (1); *Meader* v. *West Cowes Local Board.* (2)]

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of a Divisional Court, consisting of Channell and Sutton JJ., by which it was held that the word "sewers" in the proviso to s. 7 of the Rivers Pollution Prevention Act, 1876, refers only to the pipes in which the sewage is received, and not to the sewage system as a whole. Channell J. dealt with the matter as follows in his judgment. He said: "The question to be determined is what is the meaning of the words 'sewers of such authority,' as to which we have to consider whether they were only sufficient for the requirements of the district. The plaintiffs contend that they mean the sewers proper, the pipes along which the sewage is carried, and that they do not include the works for the treatment of the sewage before it flows into the river. The defendants, on the other hand, contend, and their contention was upheld by the county court judge, that the word 'sewers' includes all the artificial structures used for the purpose of carrying away the sewage from the point where the sanitary authority receive it to the point where they eventually pour it into the river and it passes out of their control; that it covers the whole sewage system so far as it consists of artificial structures through which the sewage flows, including purification works whereby the sewage is treated in the course of its passage, though possibly it would not cover an ordinary sewage farm, where the sewage merely percolates through the earth." Having thus stated the contentions on either side, the learned judge proceeded in a manner which seems to me to shew that, independently of authority, his own view would have been that the word "sewers" in the proviso should be construed as covering the whole sewage system; but, ultimately, he held that he was constrained by authority to take the other view. The reasons given by him as those which would have led him to take the view that the word "sewers" covered the whole

(1) [1901] 2 Ch. 768. (2) [1892] 3 Ch. 18.

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sewage system, if he had not been so constrained, are so apt and forcible that I cannot do better than read them. He said: "This latter contention," i.e., the contention of the defendants, "is in my opinion one for which there is a great deal to be said, having regard to the obvious policy of the Act. Its object, as its title indicates, is to prevent the pollution of rivers, and, in pursuance of that object, it prohibits a manufacturer from sending his refuse directly into the river in an unpurified condition, and, partly in order to ensure his not doing so, it contains this clause as to the authority giving him facilities for carrying away that refuse. That right to use the public sewers for the purpose of discharging liquid refuse from factories into them had already been given by the Public Health Act; and the effect of the proviso in s. 7 is to restrict that right. It seems to me that, looking at the policy of the Act, the proviso must mean that, while recognizing the manufacturer's right to pour his refuse into the sewer, it limits the exercise of that right to cases in which the sewage system is sufficient to allow of the refuse being disposed of with the sewage proper as that is already disposed of, and, if that has to be purified, then sufficient for the whole to be purified before being discharged into the river. If the sewage system was not sufficient for that purpose, there was no more reason why the manufacturer should be at liberty to call on the ratepayers of the district to provide new purification works than to call on them to enlarge the pipes of their sewers. Looking at the matter, therefore, as one of policy, and apart from authority, I should say there was very strong reason for holding that the word 'sewers' meant the sewage system." Those observations shew what the learned judge's own view was, and appear to me to afford excellent reasons for the conclusion which he clearly would have come to but for authorities by which he thought himself bound.

I have therefore to consider whether there is any authority by which this question is concluded. The learned judge said as to this: "The very point has directly arisen before the Court of Session in *Guthrie & Co.* v. *Brechin* (1), and it was held that the word 'sewers' referred to the pipes in which the sewage was received, and not to the disposal works where it was dealt with

(1) 15 R. 385.

after it had passed through the pipes. It was indeed sought by Mr. Scott Fox to distinguish that case upon the ground that there the sewage was treated by means of an ordinary sewage farm, which could not by itself, and except as part of a larger system, be said to come within the designation of a sewer; whereas here the purification of the sewage to a large extent takes place during its passage along the pipes of which the treatment apparatus is composed. But I do not think that that is a substantial distinction, because the main object for the use of those pipes, although the sewage flows through them, is not that it should flow, but that it should be treated." Then he said that the decision in *Guthrie & Co.* v. *Brechin Magistrates* (1), being that of a Court in Scotland, was not binding upon the Divisional Court, which of course was the case, but that, as the Act of 1876 applied to Scotland as well as to England, it was desirable that the law should be laid down in the same way in both countries, and on that ground the decision should be followed. Now, of course, this Court would treat the decision of the Court in Scotland with very great respect; but, although that is so, and although it may be true, as contended, that the passage in Lord Halsbury's judgment in *Pasmore* v. *Oswaldtwistle Urban District Council* (2), in which he treats the word "sewers" in the proviso to s. 7 as being equivalent to "drainage system," is merely an obiter dictum, still, when we are dealing with the effect of a judgment which is not absolutely binding upon us, I think we are entitled to take into consideration a dictum in the House of Lords of such a character as that which I have mentioned. Furthermore it seems to me that, when one looks at the decision in *Guthrie & Co.* v. *Brechin Magistrates* (1), there is more by way of reason why we should not follow that decision than that which I have just referred to. I find on looking at the report of the judgment of the Lord President in that case (3) that he first cites the Public Health (Scotland) Act, 1867, s. 77, which is really the equivalent of s. 21 of the Public Health Act, 1875, and then goes on to deal with s. 7 of the Rivers Pollution Prevention Act, 1876. He seems to assume that under the former Act

(1) 15 R. 385. (2) [1898] A. C. 387, at p. 396.
(3) 15 R. 391, 392.

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there was an absolute right given to a manufacturer to send liquid manufacturing refuse into the sewers, and on that assumption he proceeds to deal with s. 7. After reading that section, and dealing with the first proviso, he goes on to deal with the proviso which we are now considering, and says that "the measurement of capacity referred to in the Act is not the ability of the town to dispose of the sewage after it has passed through the pipes, but the capacity of the pipes to receive it. Now it was not proved that the pipes were not large enough, and the only point is that they must be large enough to receive the fluid in addition to the ordinary sewage of the town." It is not necessary for me, I think, to say more with regard to that passage than that I cannot agree with the construction which the Lord President there puts upon the second proviso to s. 7. I think that it was intended by the provisoes to the section to negative the existence of any right to have the facilities mentioned therein, not only in cases where the sewer pipes would be damaged, or the disposal of the sewage by sale, application to land, or otherwise, would be prejudiced, or where the sewer pipes are not of sufficient capacity, but also in cases where the introduction of the manufacturing refuse would have the effect of preventing the purification of the matter coming along the sewer by the existing sewage system in such a manner as to render it fit to be discharged into the river. As I have said, we are not bound by the decision of the Court in Scotland in that case, and I do not think that it really affords any sufficient reason for upholding the conclusion at which Channell J. thought himself bound to arrive by reason of it. The other case which was treated by Channell J. as binding him was *Eastwood Brothers* v. *Honley Urban Council.* (1) The learned judge says that the point now under discussion was dealt with in that case by Rigby L.J., but, when his judgment is looked at, it will be seen that, before making use of the expressions relied upon, he had already decided the case on a different ground. That ground appears to me to be correctly stated by Mr. Fitzgerald in his work on "The Law affecting the Pollution of Rivers and Water," p. 112, as follows:

(1) [1901] 1 Ch. 645.

"If a drain from a factory has once been lawfully connected with a sewer, this section does not empower the local authority to cut off the connection on the plea that the refuse discharged from the drain is calculated prejudicially to affect the sewer." I think that fairly represents the effect of the judgment, and, that being so, the particular observation of Rigby L.J. which led Channell J. to decide as he did ought not, I think, to affect our judgment. For the reasons which I have given I think that the word "sewers" in the proviso to s. 7 of the Act of 1876 ought to be construed as meaning the whole sewage system of the local authority, and therefore this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. I also think that the observations of Channell J., indicating the view which he would have taken if the matter had been res integra, afford sufficient grounds for a decision in favour of the appellants. The case, however, raises an important point on the construction of the Act of 1876; and, as there is a decision to the contrary by the Court of Session in Scotland, which, though not binding upon us, is entitled to great respect, I think it necessary to examine somewhat in detail the law on the subject.

In this case an action was brought by the respondents in the county court under s. 10 of the Rivers Pollution Prevention Act, 1876, claiming that they were entitled under s. 7 to be allowed to discharge 65,000 gallons of liquid refuse per day into the appellants' sewers. When we examine s. 7, we find that it is a section which confers certain rights upon the owners of manufactories, and imposes a corresponding burden on the local authority, the extent of which is carefully regulated by the section. The main provision of the section is that local authorities having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into their sewers, subject to certain provisoes. In my opinion, this section cannot be regarded as a section which takes away any right which the owners of manufactories previously possessed.

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To my mind, therefore, it is impossible to conceive that, at the date of the passing of the Act of 1876, manufacturers had an absolute right, subject to no proviso, to carry the liquids proceeding from their factories or manufacturing processes into the sewers of the local authority. The existence and terms of the clause appear to me to negative the idea that any such right existed.

The respondents, however, contend that an absolute right of this kind was given to every member of the public by s. 21 of the Public Health Act, 1875, which provides that the owner or occupier of premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by the authority of his intention so to do, and of complying with the regulations of that authority as mentioned in the section. They point out that this provision, and a similar provision in the Public Health (Scotland) Act, 1867, appear to have been interpreted by certain Courts of first instance in England, and by the Court of Session in Scotland, respectively, to mean that any occupier of premises has a right to make his drains communicate with the sewers of the local authority, and to discharge into those sewers anything whatever, whether sewage or manufacturing refuse. The cases which they cite support their contention, but I do not agree with those decisions, and they are not binding upon us. In my opinion that is not the meaning of the provision. It does, I think, impliedly permit the owner or occupier of premises to discharge "sewage" into the sewers of the local authority, but "sewage," in my opinion, does not include manufacturing refuse. That the distinction between the two is not fanciful is clearly shewn by the very Act which we have to consider in the present case, namely, the Rivers Pollution Prevention Act, 1876. That Act is divided into four parts. Part I. deals with the "law as to solid matters." Part II. deals with the "law as to sewage pollutions." Part III. deals with the "law as to manufacturing and mining pollutions." Sect. 3 of the Act, which is included in Part II., provides that "every person who causes to fall or flow, or knowingly permits to

fall or flow, or to be carried into any stream, any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act"; and the section then goes on to specify certain conditions under which such an offence shall not be deemed to have been committed. Sect. 4 of the Act, which is included in Part III., provides that "every person who causes to fall or flow or knowingly permits to fall or flow, or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act"; and then the section proceeds to specify certain conditions under which that offence shall be deemed not to have been committed. It is clear that the Act treats sewage and poisonous, noxious, or polluting liquid, proceeding from a factory or manufacturing process, as two entirely different things; and in my opinion they are in the eye of the law quite different. I hold therefore that, though the right given by s. 21 of the Public Health Act, 1875, to make the drains of premises communicate with the sewers of the local authority may by necessary implication confer a right to send sewage through those drains into the sewers of that authority, the section does not give a right to discharge liquid refuse proceeding from factories or manufacturing processes into those sewers.

If that be so, the provisions of s. 7 of the Act of 1876 become quite intelligible. They give to manufacturers a right of discharging manufacturing refuse into the sewers which they did not possess before, but the right so given is a limited right subject to certain reasonable restrictions. After providing that the local authority shall give the facilities which I have already mentioned (an obligation which did not rest upon them before) the section goes on thus: "Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view." If the manufacturers already possessed under s. 21 of

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the Act of 1875 the absolute right to discharge any manufacturing refuse into the sewers, this proviso would, as I have pointed out, be meaningless, but it is full of meaning if, as in my opinion is the case, the section gives a new right to manufacturers for the purpose of enabling them to get rid of their manufacturing refuse, subject to the reasonable restrictions mentioned in the section. The first of these is that the refuse so discharged into the sewers must not be such as will prejudicially affect the sewers themselves or the sewage thereby carried, as, for instance, by decomposing it or causing it to become precipitated, or otherwise affecting it, so as to prevent the sale of it, or disposal of it on land, or otherwise, and thus interfere with the performance of the duty of the local authority, which is not only to collect and carry away the sewage, but also to dispose of it. Therefore, if the addition of any manufacturing refuse to the body of the sewage which is carried along by the sewers would either interfere with the operation of the works provided for disposal of the sewage, or render the effluent unfit to be discharged into the stream, the local authority cannot be compelled to give facilities for its discharge into their sewers.

The section then proceeds by the second proviso to deal with cases in which the discharge of manufacturing refuse into the sewers will neither prejudicially affect the sewers themselves, nor the mode in which the disposal of the sewage has theretofore been carried on, by reason of the nature of such refuse, but in which the works of the local authority are only sufficient to deal with the sewage proper of the district. In other words, it deals with cases where the objection to receiving the trade effluent is due, not to its nature, but to its quantum. With regard to such cases it provides as follows: "Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any Court of competent jurisdiction respecting the sewage of such authority." Therefore the result of the legislation is that, where, on account of the limited capacity of the existing "sewers," and the volume of the manufacturing refuse which it is proposed to discharge into the

sewers, the local authority are unable by their existing "sewers" to perform for the manufacturers the services which they require to have performed, the manufacturers have no right to compel them to perform those services. So far as the local authority can by means of their existing sewers assist the manufacturers to get rid of their manufacturing refuse, they are bound to do so, but the manufacturer is not entitled to compel them to incur the expense of enlarging their sewers to enable them to do so, or, as Lord Halsbury put it in *Pasmore* v. *Oswaldtwistle Urban District Council* (1), "to establish a manufactory for his own profit, and throw upon the rates, paid by all the inhabitants, who have no concern with the manufactory at all, the necessity for providing for that great source of expense to the manufacturer of getting rid of his own refuse." Reading the proviso to s. 7 by the light of the interpretation which I have endeavoured to give of the legislation on the subject, and with reference to the reason of the thing, I ask myself what is the meaning of the word "sewers" in that proviso; and the answer seems to me to be that it must mean the system of sewerage, the whole system by which the collection and disposal of the sewage are effected by the local authority. If part of that system consists of settling tanks or other such works required for the purpose of bringing the effluent into such a condition that it can properly be discharged into the river, it is impossible, I think, to suppose that it was intended by the section to allow the manufacturers to throw on the local authority the expense of increasing those works to the extent which would be rendered necessary by the manufacturing refuse which they might discharge into the sewers, while it was felt to be just to spare the authority from the expense of any increase in the size of the barrels of the sewers which might so be rendered necessary. I have, therefore, no doubt that the word "sewers" in the proviso ought to be construed as meaning the whole sewage system of the local authority.

BUCKLEY L.J. In this case I prefer the opinion of Channell J. as expressed in the first part of the judgment which he delivered to the order which he ultimately made in deference to the decision

(1) [1898] A. C. 387, at p. 397.

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of the Court of Session in Scotland in the case of *Guthrie & Co.* v. *Brechin Magistrates* (1), and to what he took to be the effect of the judgment of Rigby L.J. in the case of *Eastwood Brothers* v. *Honley Urban Council.* (2) I think that the opinion which he expressed was right, and that the order under appeal was wrong.

The question is whether the word "sewers" in the second proviso to s. 7 of the Rivers Pollution Prevention Act, 1876, means the pipes or conduits through which the sewage flows to the works for disposal of the sewage (to the exclusion of those sewage disposal works) or means the whole sewage system.

The facts material to this appeal are these. The plaintiffs claim to be entitled to discharge into the sewers effluent proceeding from their factory to the extent of 65,000 gallons per day. It is admitted that the capacity of the pipes or conduits which carry the sewage to the sewage disposal works is sufficient to take 65,000 gallons per day in addition to the sewage which they now receive, but the sewage disposal works are not sufficient to deal with so large a quantity. The plaintiffs were offered, but refused to accept, an order affirming their right to discharge to an amount lying within the present capacity of the sewage disposal works.

In *Peebles* v. *Oswaldtwistle Urban District Council* (3) Charles J. no doubt held that the duty of a sanitary authority extended to providing sewers sufficient, not merely for the purpose of carrying away the ordinary sewage of the district, but also for the purpose of carrying away the effluents from manufactories in their district, and that the performance of this duty was enforceable by mandamus. On appeal from his decision (4) the Court of Appeal held that, whether such a duty on the part of the sanitary authority existed or not, it was not enforceable by mandamus. In *Pasmore* v. *Oswaldtwistle Urban District Council* (5), which was an appeal to the House of Lords from the decision of the Court of Appeal in the before-mentioned

(1) 15 R. 385.
(2) [1901] 1 Ch. 645.
(3) [1897] 1 Q. B. 384.
(4) [1897] 1 Q. B. 625.
(5) [1898] A. C. 387.

case, the judgment of that Court was affirmed. The ground of the decision in the House of Lords was the same as in the Court of Appeal, namely, that, whether the duty existed or not, it was not enforceable by mandamus; but Lord Halsbury L.C. dealt with the other point also in his judgment. (1) I understand the effect of what he said to be that, in his opinion, the Public Health Act, 1875, never gave manufacturers an absolute right to discharge their manufacturing refuse into the sewers of the local authority, but, if that was not his meaning, at any rate he must have meant that the Public Health Act, 1875, was so modified and qualified by the Rivers Pollution Prevention Act, 1876, that after 1876 manufacturers could not, where the drainage system of a district is only sufficient for the ordinary requirements of the district, impose on the authority the obligation of providing for their refuse. After that expression of opinion I think it is open to us to hold, and I do hold, that the view taken by Charles J. in *Peebles* v. *Oswaldtwistle Urban District Council* (2) was wrong.

That being so, I will consider the effect of s. 7 of the Act of 1876. The first observation that occurs to me on that section is that, if the Act of 1875 had conferred an absolute right on manufacturers to discharge their refuse into the sewers of the local authority, there would have been no reason for providing by s. 7 of the Act of 1876 that the authority should give facilities for enabling manufacturers to carry their effluents into the sewers of the authority. For, on that hypothesis, they already had an absolute right so to do. Then, what are the facilities in question? They are to be given subject to certain provisoes, the second of which is that now in question. It provides that "no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district." The question is whether "sewers" in that proviso means merely the pipes or conduits in which the sewage is carried, to the exclusion of the sewage disposal works, or the whole sewage system, including those works? Upon that question a most material observation appears to me to be that the word is found in an Act the

(1) [1898] A. C. at pp. 396, 397. (2) [1897] 1 Q. B. 384.

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object of which is to prevent the pollution of rivers. In such an Act I think the word "sewers," as used in the section, must, prima facie, be taken to include the whole of such constructions dealing with sewage as will have a tendency to pollute rivers. These will be, first, the pipes by which the sewage is collected and carried to the sewage disposal works; secondly, the sewage disposal works; and, lastly, the outfall by which the effluent is carried into the stream. In considering the question of the pollution of a river, what would be contemplated, I think, in the use of the term "sewers" would be the whole system from the first channel in which the sewage is received to the last channel by which it is ultimately discharged into the river. The language of Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban District Council* (1), where, in discussing the effect of the section, he speaks of the "drainage system" of a district as "only sufficient for the requirements of the district," shews that he construed the word "sewers" in the section as meaning, not merely the pipes or conduits by which the sewage is conveyed, but the whole sewage system.

But it is said that there are two authorities which are inconsistent with the conclusion which I have been expressing. The first is the case of *Guthrie & Co.* v. *Brechin Magistrates.* (2) That decision is not binding on us any more than it was binding on Channell J., though this Court will, of course, look upon the decision of the Court in Scotland with great respect. I must confess that I cannot follow the reasoning of the Court in that case. The Lord President, after referring to s. 77 of the Public Health (Scotland) Act, 1867, which is in all material particulars the same as s. 21 of the Public Health Act, 1875, said: "Now, this confers an absolute right on any occupier or owner of premises in the district to use the sewers, provided he be liable to assessment for sewage." Having regard to the context, this was meant to include manufacturers discharging trade effluent. I cannot concur in that view. I do not think that the Scottish Act or the Public Health Act, 1875, ever gave such an absolute right to a manufacturer to use the sewers; and, if it did, I think it was taken away, and not, as the Lord President

(1) [1898] A. C. 387. (2) 15 R. 385.

says, made more imperative, by the Act of 1876. The case with which the Lord President was there dealing, like the present, arose under s. 7 of the Rivers Pollution Prevention Act, 1876, which he then proceeded to discuss. He said with reference to the proviso in that section that "the measurement of capacity referred to in the Act is not the ability of the town to dispose of the sewage after it has passed through the pipes, but the capacity of the pipes to receive it." Again I must respectfully differ. I do not think that the capacity of the pipes to receive the sewage, but the ability of the authority to receive and dispose of it by means of the existing sewage system, before it reaches the outfall into the river, is the measurement of capacity referred to in the Act. Another case which was treated by Channell J. as bearing upon the present was *Eastwood Brothers* v. *Honley Urban Council.* (1) The facts in that case were these A connection had been made in 1885 between a drain which carried the effluent from the premises of the plaintiffs, who were manufacturers, and the drainage system of a local authority. The connection had been made by the authority themselves. The question was whether in 1899 the benefit which had been enjoyed for so many years by the plaintiffs could be put an end to by the local authority. That is obviously a very different question from the question here, which is whether manufacturers are entitled, under s. 7 of the Act of 1876, to begin discharging their trade refuse into the sewers of the local authority. I cannot myself find anything in the judgment of Rigby L.J. in that case which could give it the effect which Channell J. attributed to it as an authority for the present case. In my view the case of *Eastwood Brothers* v. *Honley Urban Council* (1) has really little, if any, bearing upon the question before us in the present case, namely, whether a manufacturer is entitled under s. 7 of the Act of 1876 to discharge manufacturing refuse into the sewers of an authority where their existing sewage system is not sufficient to deal with it. I agree with all the observations which were made by Channell J. at the commencement of his judgment, and which would obviously, if he had not thought their effect was overbalanced

(1) [1901] 1 Ch. 645.

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by authority, have led him to the conclusion at which we have arrived.

Appeal allowed.

Solicitors for plaintiffs: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Learoyd & Co., Huddersfield.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1908 *June* 1.

FITZGERALD *v.* W. G. CLARKE & SON.

Employer and Workman—Compensation—Accident arising "out of and in the Course of" the Employment—Tortious Act of Fellow-workman—Act having no Relation to the Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

An employer is not liable under the Workmen's Compensation Act, 1906, to pay compensation for injury caused to a workman while engaged at his work by the tortious act of a fellow-workman which had no relation to the employment.

Armitage v. *Lancashire and Yorkshire Ry. Co.*, [1902] 2 K. B. 178, followed and approved.

Per Buckley L.J.: The words "out of and in the course of the employment" in s. 1, sub-s. 1, of the Act are used conjunctively, and are not to be used as meaning out of—that is to say, in the course of. The words "out of" point to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes places.

APPEAL from a decision of the judge of the Bow County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

The applicant (and the appellant) was employed by the respondents, W. G. Clarke & Son, at their Broadwater Wharf, Limehouse, to fill biscuits into sacks and wheel them where required. The place where this work was usually done was just inside the wharf and opposite the door; outside this door hung the hook and chain attached to the hoist. On the morning of June 6, 1907, two other workmen, also in the employ of the

respondents, came behind the applicant and attached the hook of the hoist to his collar or some portion of his clothes as a practical joke, with the result that the applicant was hoisted up some fifty feet, fell on to a barge, broke his thigh, and sustained other serious injury.

The two workmen were subsequently prosecuted and convicted of unlawfully causing grievous bodily harm to the applicant.

The applicant also claimed compensation from the respondents under the Workmen's Compensation Act, 1906.

The county court judge found as a fact that the applicant was doing his work at the time the practical joke was played upon him, and he therefore thought that the injury occurred in the course of the employment, but that, having regard to *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1), he could not find in favour of the applicant that he was injured by an "accident arising out of" his employment.

The applicant appealed.

G. F. Emery, for the appellant. This injury clearly happened to the workman "in the course of" his employment; the question is, Did it arise "out of" the employment? That it was an accident is plain, and if authority is required *Fenton* v. *Thorley & Co., Ld.* (2) is in point. This is just as much an "injury by accident" arising "out of" the employment as was the "injury by accident" in *Fenton* v. *Thorley & Co., Ld.* (2) and the "injury by accident" in *Brintons, Ld.* v. *Turvey* (3), where the proper method of construing the Workmen's Compensation Act is discussed. The accident would not have happened had it not been for the employment.

Armitage v. *Lancashire and Yorkshire Ry. Co.* (1), which the county court judge considered binding, was decided prior to *Brintons, Ld.* v. *Turvey* (3) and *Fenton* v. *Thorley & Co., Ld.* (2), and, so far as it is inconsistent with those decisions, must be taken to have been overruled.

The accident here arose out of the employment just as much as the accident did in *Challis* v. *London and South Western*

(1) [1902] 2 K. B. 178. (2) [1903] A. C. 443.
(3) [1905] A. C. 230.

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Ry. Co. (1), and that case is inconsistent with the test laid down by Collins M.R. in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (2) Here the appellant ran the risk of having a fool for a fellow-workman who would play such a trick as this. In *Andrew* v. *Failsworth Industrial Society* (3) the accident from lightning was held to entitle the workman to compensation, an accident which at first sight would seem to have nothing to do with the employment. In the present case the accident did arise out of and in the course of the employment, and the appellant is therefore entitled to compensation.

Clavell Salter, K.C., and *G. Stewart Robinson*, for the respondents, were not called upon.

COZENS-HARDY M.R. I think this appeal fails. This Court in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (2) laid down a clear and intelligible proposition, that where an accident happened to a workman, while engaged at his work, through the tortious act of a fellow-workman which had no relation to their employment, the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act. It was there argued, as it has been argued here, that where a number of young boys are employed together at works it is a common experience that they will, when the foreman's back is turned, occasionally engage in larking, and it was submitted there that, if two boys in the same employment got larking over their work and injury is accidentally thereby occasioned to a third who is engaged upon his work, the accident may be said to arise out of and in the course of the employment. That argument was dealt with and repudiated by every member of the Court in the year 1902. So far as I am aware, that case has never been questioned or challenged in this Court or in the House of Lords. There is nothing inconsistent with this decision in the subsequent case of *Challis* v. *London and South Western Ry. Co.* (1) which has been referred to. In my view, if this point is intended to be raised it must be raised elsewhere, and it is not for us to go back upon the

(1) [1905] 2 K. B. 154. (2) [1902] 2 K. B. 178.
(3) [1904] 2 K. B. 32.

deliberate and unanimous decision of this Court in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) I think, therefore, that the appeal should be dismissed with costs.

BUCKLEY L.J. The person entitled to compensation under the Act is a workman who in an employment suffers personal injury by accident arising out of and in the course of the employment. The words "out of and in the course of the employment" are used conjunctively, not disjunctively. Upon ordinary principles of construction they are not to be read as meaning "out of" —that is to say, "in the course of." The former words must mean something different to the latter words. The workman must satisfy both the one and the other.

The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of" involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment. Thus the accident by lightning in *Andrew* v. *Failsworth Industrial Society* (2) resulted from the risk to which the workman's duty exposed him of being placed during a thunderstorm in a position in which upon the evidence he ran an appreciably greater risk of being struck. In *Challis* v. *London and South Western Ry. Co.* (3) the accident resulted from the risk involved in its being the duty of the engine driver to expose himself to the possibility of being injured by a mischievous boy doing an act which the Court considered to be as matter of common knowledge and experience one which a mischievous boy is likely to do. The case which gives me the most difficulty is *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (4), principally because the Court upon the second hearing thought that the case was carried over the

(1) [1902] 2 K. B. 178.
(2) [1904] 2 K. B. 32.
(3) [1905] 2 K. B. 154.
(4) [1903] 2 K. B. 718.

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line by evidence which did no more than negative the idea of any deliberate act on the part of the deceased man. But that case may be explained, I think, as follows. Every one who travels by railway has to accept the risk of injury by collision, derailment, accidental fall from the train, or the like. But a railway servant whose duty it is in the course of his employment to travel daily upon the railway, has to run that risk to a very much larger extent, and an accident by collision, derailment, accidental fall, or the like in his case arises out of his employment as an accident arising out of that greater risk which his duty compels him to run. It was in the course of the fireman's employment to return home by train, and the accident may be said to have arisen out of the employment because the risk which resulted in the accident which killed him was the greater risk of railway travelling daily for the purposes of his employment.

By way of contrast to these cases stands *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) The principle of that decision was that the employer is not liable for the tortious act of a fellow-workman which had no relation whatever to the employment. The case with which we have here to deal seems to me to be a case of the *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) class. The risk of having a fellow-servant who would be guilty of such an act of senseless, reckless folly, as was committed in this case, was not in any way incidental to the employment, and the accident was in no sense due to the employment. In my opinion the case is not within the Act.

We have been pressed with an argument that *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) has been somehow affected by the cases of *Fenton* v. *Thorley & Co., Ld.* (2) and *Brintons, Ld.* v. *Turvey.* (3) To my mind those cases have no application. I think the employer is not liable and the appeal should be dismissed with costs.

KENNEDY L.J. I agree. I will assume that the word "accident" can be properly used, and that what happened to this man arose in the course of his employment. It appears to me

(1) [1902] 2 K. B. 178. (2) [1903] A. C. 443.
(3) [1905] A. C. 230.

that the appellant absolutely fails when he endeavours to contend that in any sense, according to the proper use of words, what happened arose "out of" the employment. The learned counsel seem to suggest that there might be a scientific meaning of the expression and a non-scientific meaning of the expression. I can only say that I take it according to the natural meaning and in no technical or narrow sense—in the only sense which I know that the words "out of" the employment can bear; and I do not think they can be better interpreted than they were by the Master of the Rolls in his judgment in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) In that case the argument that failed really involved the erasure of the words "out of" from the section. I do not know that one could give a better explanation when seeking to give the right meaning to the words "out of" than is given at p. 183 of that case, namely, that the words appear to point to accidents "arising from such causes as the negligence of fellow-workmen in the course of the employment or some natural cause incidental to the character of a business." If I were to venture to add anything, that somebody might not carp at the expression "natural," having regard to the case of *Challis* v. *London and South Western Ry. Co.* (2), it would be to add to the word "natural" "or common." In my opinion there is no ground for the appeal.

Appeal dismissed.

Solicitors: *T. A. Capron & Co.; Griffith & Gardiner.*

(1) [1902] 2 K. B. 178. (2) [1905] 2 K. B. 154.

W. C. D.

C. A.
1908
June 3, 4.

[IN THE COURT OF APPEAL.]

HILL *v.* BEGG.

Employer and Workman—"Workman"—"Person whose Employment is of a casual Nature"—Window Cleaner—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A man who earned his living by doing odd jobs was employed by the occupier of a private house to clean his windows. He had been so employed at irregular intervals of about six weeks during a period of two years. He was usually sent for when the windows required cleaning, and when he came was paid 6*s.* 6*d.* a day for his work. There was no agreement between the parties of either permanent or periodic employment. While so employed the man met with his death through an accident:—

Held, that the employment was "of a casual nature," that the deceased was therefore not a "workman" within s. 13 of the Workmen's Compensation Act, and consequently that the employer was not liable to pay compensation under the Act.

Appeal from an award of the judge of the Marylebone County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The question raised upon this appeal was as to the meaning of the words "employment of a casual nature" in s. 13 of the Act. (1)

The application for compensation under the Act was made by the brother of a man named Henry Hill, who met his death while engaged in cleaning the windows of the appellant Begg's private dwelling-house. The deceased had earned his living by doing odd jobs as a window cleaner, and during the past two years whenever the appellant's windows wanted cleaning Hill had been summoned, by means of a post-card sent by the appellant's wife through one of the servants, to come and do the work, for which he

(1) The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13, provides as follows: "Workman does not include . . . . a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business . . . . but save as aforesaid means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

was paid at the rate of 6*s.* 6*d.* a day. The post-cards were sent and the work was done at irregular intervals of about one month or six weeks, but there was no contract entitling the appellant to Hill's services, or giving Hill any right to claim damages if not employed.

Under these circumstances the learned county court judge held that there was sufficient continuity about the work, which recurred at practically regular intervals, to take it out of the definition of casual employment. He also held that the applicant was partially dependent on the deceased, and he awarded him compensation under the Act.

From this decision the present appeal was brought.

C. A. McCurdy, for the appellant. The employment in this case was "of a casual nature." There was no regular contract of service. The word "casual" in the section means "chance." This man was in the habit of doing odd jobs for a number of different persons. There was no obligation either on his part to come when called upon, or on the part of the appellant to give him the work when it required doing. It may be that the fact that he had been employed for two years justified a reasonable expectancy that the employment would be continued, but that did not give him the status of a servant or the right to demand employment. It was a mere chance employment.

Douglas Knocker, for the respondent. To some extent the work done by this man was regular. Casual employment may be defined as the acceptance of an unanticipated opportunity to work. Where the same person is employed at recurring times to do certain work which must be done, or which it is known will be convenient to do at such recurring times, the employment of such a person is not "of a casual nature": Ruegg's Employers' Liability and Workmen's Compensation, 7th ed. p. 227. Here the work was not unexpected. There were certain fixed elements about it, namely, the rate of wages, its regular periodicity, and the length of time during which the employment had continued.

[COZENS-HARDY M.R. referred to *Hathaway* v. *Argus Printing Co.* (1)]

(1) [1901] 1 K. B. 96, at p. 100.

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Here there was at least an expectation of repeated employment.

McCurdy, in reply. Expectation is immaterial unless it arises out of contract.

Cur. adv. vult.

June 4. COZENS-HARDY M.R. The question raised in this appeal is whether a man who was employed by the present appellant to clean windows of his private house, not by virtue of any contract entitling either the appellant to claim the man's services or the man to claim damages if not employed, is a "workman" entitled to compensation within the meaning of the Act of 1906. The evidence shews that for some two years when the windows required cleaning a post-card was sent to the man, who did odd jobs of this nature, and if he came he was paid 6*s.* 6*d.* a day for what he did. Sect. 13 of the Act contains a definition of "workman," which so far as is material is as follows: "Workman does not include (1.) a person whose employment is of a casual nature, and (2.) who is employed otherwise than for the purposes of the employer's trade or business." The appellant is a member of the Stock Exchange, and it is of course clear that the man was not employed for the purposes of his trade or business. I think the man's employment was of a casual nature. There was no engagement that he should be employed. No complaint could have been made if any other person had been employed. It was uncertain when any person would be employed, and indeed it is not easy to frame any definition of "employment of a casual nature" which would not cover this case. A broad distinction is taken in the Act. If a man for the purposes of his trade or business employs another, it matters not that the employment is of a casual nature, such as, for example, that of a dock labourer, and the man so employed is a "workman" within the meaning of the Act. But an entirely different principle is applicable to the case of what, for the sake of distinction, I may call domestic engagements. I am not prepared to extend the burdens of the Act to householders who simply call in a man, not part of their regular establishment, to do a particular job as and when necessity arises. On these grounds

I think the learned judge was wrong in the view which he took, and that the appeal must be allowed.

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BUCKLEY L.J. A lady was in the habit, whenever her windows required cleaning, of sending for a certain man named Hill to clean them. There was no agreement of permanent or periodic employment. But, in fact, her practice was to send for the same man whenever the work required to be done. In that which follows I am dealing with a case of practice, but not of contract. The question is whether this man was a workman employed by the lady within the Workmen's Compensation Act, 1906. In my opinion he was not. The question turns upon the following words in s. 13 of the Act: "Workman does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business." The employer referred to in the second limb of this sentence is the person giving the employment referred to in the first limb. The effect of the second limb of the sentence is that if the man be employed for the purposes of a trade or business the employer is liable to him, even though the employment be of a casual nature. In other cases, such, for instance, as domestic employment, the employer is not liable if the employment is of a casual nature. I pause here to point out that the words are not "who is casually employed," but "whose employment is of a casual nature." I have to investigate what is the character of the man's employment, not what is the tenure of the employment. Is the employment one which is in its nature casual? To take an analogy or illustration from a different subject, say land. The question is what is the nature or quality of the land—is it, for instance, building land or agricultural land—not what estate is held in that land. Suppose that a host, when from time to time he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social

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obligations of the host whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature. The employment in the present case was, I think, of a casual nature. The lady might have gone abroad for some months or might have let her house, and in either of these cases the employment would, or might have, ceased. If she remained at home, there was, no doubt, a well-founded expectation of employment which would normally have resulted in employment at intervals more or less regular. But the employment remained of a casual nature. I think the Act distinctly intended that where the employment was not in a trade or business the liability of the employer should be limited to the case of servants whose employment was not casual but stable. This employment was not of that kind, and the case is, in my opinion, not within the Act of Parliament. It results that the appeal must be allowed and the application dismissed with costs.

KENNEDY L.J. I agree.

Appeal allowed.

Solicitors: *Miles, Hair & Co.; S. A. Clench & Co.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1908
July 20.

BRODERICK *v.* THE LONDON COUNTY COUNCIL.

Employer and Workman—Compensation—Injury by Accident—Disease—Sewer Gas—Enteritis—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-s.* 1.

A workman contracted enteritis from inhaling sewer gas in the course of his employment:—

Held, that this was not a case of "injury by accident" within the meaning of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1.

The decision in *Brintons, Ld.* v. *Turvey*, [1905] A. C. 230, is not to be taken as involving the doctrine that all diseases contracted by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Acts.

APPEAL against the refusal of the judge of the Marylebone County Court to award compensation to an applicant under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a workman employed by the London County Council in the sewers, who had contracted enteritis from inhaling sewer gas in the course of his employment, had met with an "accident" which would entitle him to compensation under the Act. The county court judge by his award found as facts that the applicant contracted enteritis by inhaling sewer gas while working in a sewer for the respondents, the London County Council, between 9 P.M. on July 12 and 3 A.M. on July 13, and that the result of the enteritis was to accelerate long-existing heart disease and to incapacitate the man for work before the time at which such heart disease would otherwise have incapacitated him; but the learned judge held that the contracting of enteritis in this manner was not an "injury by accident" within the meaning of the Act. The county court judge also found that it was an incident of the man's work that noxious gases should be present in the atmosphere in which he worked, and that the work therefore involved the risk of poisoning by such fumes, so that the case could not be said to be unexpected or fortuitous or unforeseen, but was a result which might be caused to any one engaged in such work;

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and he therefore made his award in favour of the respondents. There was medical evidence that enteritis was generally caused by some irritant entering the system, usually in the nature of a bacillus.

The workman appealed.

The appeal was heard on July 20.

C. A. Russell, K.C., and *Harold Morris*, for the appellant. The finding of fact by the county court judge that poisoning by sewer gas was a risk to which all men in this employ were exposed is the foundation of a finding in favour of the appellant. The source of the noxious gas was known, also that the appellant inhaled it, and the time at which the disease was contracted is also known; this distinguishes the present case from *Steel* v. *Cammell, Laird & Co.* (1) Any disease which is not idiopathic, which can be shewn as a fact to be caused at a certain time and which arises out of and in the course of the employment, is an accident. It was just as much an accident that the poison bacillus happened to find a weak spot in the appellant's lungs as it was an accident that the bacillus of anthrax happened to find a weak spot in the eye of the workman in *Brintons, Ld.* v. *Turvey*. (2)

[COZENS-HARDY M.R. referred to s. 8, providing that certain trade diseases shall entitle a workman to compensation "as if the disease . . . . were a personal injury by accident."]

Sub-s. 10 of s. 8 leaves the right of the workman to recover by accidental disease, like this, untouched. "Accident" has been defined as including unexpected personal injury resulting to the workman from any unlooked-for mishap or occurrence: *Fenton* v. *Thorley & Co., Ld.* (3) It was quite unexpected that this mishap should fall on the appellant rather than upon one of the other men engaged in this sewer.

The case is therefore within *Brintons, Ld.* v. *Turvey* (2) and the observations of the judges in *Fenton* v. *Thorley & Co., Ld.* (4), and the appellant is entitled to compensation for this accident.

(1) [1905] 2 K. B. 232.
(2) [1905] A. C. 230.
(3) [1903] A. C. 443, at p. 448.
(4) [1903] A. C. 443.

Pike Glasgow and *Engelbach*, for the respondents, were not called upon.

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COZENS-HARDY M.R. I think this appeal is too late. The words "injury by accident" have undoubtedly created great difficulty. They have been considered repeatedly by the Court of Appeal—they have also been considered by the House of Lords; and I think that both the decisions of the House of Lords and the prior decisions of this Court preclude us from yielding to the argument on the part of the appellant. In the present case the appellant was engaged in work on the sewers. This work necessarily involved exposure to sewer gas. In the course of that work he was exposed to sewer gas; and it was followed by a disease which the doctors call enteritis. It is said that is an injury by accident arising out of and in the course of the employment. It is said that it is an accident because this disease was probably due to a bacillus. I believe that the modern theory is that all diseases are due to bacilli, and I will assume that the present disease was due to a bacillus; and it is said that it was quite unexpected that this mishap would fall upon this particular man rather than upon other men engaged upon similar work, and that such a circumstance satisfies all the words of the Act, and that it was an injury arising by accident. I am entirely unable to assent to that view. Let us see how the matter stands. I do not think it is necessary to go further back than the case of *Fenton* v. *Thorley & Co., Ld.* (1) That is a case in which this Court, of which I was a member, was overruled by the House of Lords. We thought that a rupture occasioned by a workman turning the wheel of a machine was not an injury arising by accident. The House of Lords took a different view. They said that "accident," as used in the popular and ordinary sense, means a mishap or untoward event not expected or desired; and in that case Lord Macnaghten used words which have been repeated by counsel for the appellant, but which are so much in point that I ought to read them again (2): "The words 'by accident' are, I think,

(1) [1903] A. C. 443. (2) [1903] A. C. 443, at p. 448.

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introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease." It is not, therefore, enough to say that the man has met with an injury in the course of his employment; you must have a further element of accident in order to bring the case within the authorities. Then came the anthrax case, *Brintons, Ld.* v. *Turvey* (1), in which this Court and the House of Lords held that there was the element of accident, because just as if a blacksmith at work in his forge has a spark emitted which lights upon his eye and destroys his eye that would be an accident, so in the anthrax case, having regard to the finding of fact by the learned county court judge, it was as much an accident that the bacillus which the county court judge there found to be the cause of the accident was present in the wool; it did not go away, but actually alighted upon the tender spot in the eye, giving rise to and causing disease. But in this Court, and also in the House of Lords, it was carefully asserted that the doctrine of the anthrax case was not to be so extended as to hold that every disease arising out of and in the course of the employment fell within the Act. I will only refer to the language of Lord Lindley, who says (2): "I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act." Since that case the matter has come before this Court in *Steel* v. *Cammell, Laird & Co.* (3) That was a lead poisoning case, in which Mathew L.J. said (4): "The man was following a dangerous occupation, because it might involve the risk of lead poisoning. But the evidence shews that in the majority of cases the workman would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual, it could not be said that the case was unexpected or fortuitous or unseen." Although I do not like at any time to refer to my own judgment, I there said what I venture now to

(1) [1905] A. C 230.
(2) [1905] A. C 230, at p. 237.
(3) [1905] 2 K. B. 232.
(4) [1905] 2 K. B. 232, at p. 237.

repeat (1): "It is not enough to say that the injury arises out of and in the course of the employment. Injury by disease alone, not accompanied by an accident, is expressly excluded, as pointed out by Lord Macnaghten in *Fenton* v. *Thorley & Co., Ld.* (2) It must be made out not merely that there is injury arising out of and in the course of the employment, but injury by accident arising out of and in the course of the employment." The argument for the appellant, when traced to the very bottom, would undoubtedly mean holding that every man who in the course of and arising out of his employment contracts a disease is entitled to compensation under the Act. That, in my view, is not the effect of the old Act, or of the new Act. I think if it is necessary to gain strength for this opinion it may be found in s. 8 of the 1906 Act, which says that certain diseases are to have the same result (if they produce death) in favour of dependants of the deceased as if death had been caused by "a personal injury by accident arising out of and in the course of that employment"—that is to say, although the disease would not otherwise have fallen within the Act, because the death by disease was not "an accident." What the appellant is suffering from is not a disease within the Third Schedule to the 1906 Act nor within the subsequent order of the Home Secretary, and therefore the appellant cannot claim the benefit of s. 8. In my view the decision of the learned county court judge is right and this appeal must be dismissed.

FARWELL L.J. I agree, and have nothing to add.

KENNEDY L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co.; Edward Tanner.*

(1) [1905] 2 K. B. 230, at p. 238. (2) [1903] A. C. 443, at p. 448.

W. C. D.

1908
July 30.

In re HOLMES.
Ex parte ASHWORTH.

Bankruptcy—Landlord and Tenant—Disclaimer of Lease of Plot of Land—Mortgage by Demise of Portions of Plot—Order vesting in Mortgagees whole Plot including Portion not mortgaged—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.

The lessee of a plot of land subject to a rent of 150*l.* a year mortgaged by sub-demise four portions of the plot to four different mortgagees by separate mortgages. He did not mortgage the remaining portion of the plot nor deal with it in any way. He subsequently became bankrupt, and his trustee in bankruptcy disclaimed the lease. The four mortgagees appointed a trustee of their interests under the mortgages, and he applied to a county court judge on their behalf for an order vesting in him as trustee for them all the rights, interest, and title of the bankrupt under the lease, including the portion of the plot not mortgaged, subject to the rent, covenants, and conditions contained in the lease. The county court judge made the order. The applicant was solvent, and no suggestion was made that he was not a proper person to be appointed trustee by the mortgagees:—

Held, that the vesting order was rightly made.

Appeal from an order of the judge of the Yorkshire County Court.

On September 21, 1899, the appellant Close demised to Holmes a plot of land for a term of 999 years from December 25, 1893, at a yearly rent of 150*l.* By the lease Holmes covenanted (inter alia) that he would within the space of twelve calendar months from April 29, 1899, erect twelve houses at a total cost of at least 10,800*l.* Holmes divided the land into five plots, upon four of which he built a total number of ten houses, three houses upon each of two of the plots and two upon each of the other two plots. Each of these four plots together with the houses he had built thereon respectively he mortgaged to four different mortgagees by four separate mortgages. He never built upon the fifth plot, nor did he mortgage it or deal with it in any way. He apportioned the 150*l.* ground rent to the extent of 116*l.* as between himself and the mortgagees respectively in the sums of 38*l.*, 19*l.* 10*s.*, 22*l.* 10*s.*, and 36*l.*, leaving a balance of 34*l.* to arise in respect to the fifth plot.

The lessor Close was not a party to this apportionment and was therefore not bound by it in any way. On June 19, 1907, a receiving order was made against Holmes, and shortly afterwards he was adjudicated bankrupt, the official receiver being appointed trustee in the bankruptcy.

On September 20, 1907, the trustee in bankruptcy gave notice that he intended to disclaim the lease of September 21, 1899, and on October 1, 1907, he executed a disclaimer. The four mortgagees thereupon appointed the respondent Ashworth trustee of their interests under the mortgages, and agreed that he should apply for a vesting order of the entire piece of land demised by the lease of September 21, 1899, including the vacant plot. The respondent accordingly made an application to the county court judge, who ordered that all the rights, interest, and title of Holmes under the lease of September 21, 1899, in the land, including the vacant plot, should vest in the respondent subject to the yearly rent of 150*l.* and the covenants and conditions in the lease contained. The respondent was solvent, and no suggestion was made that he was not a proper person to be appointed trustee by the mortgagees.

The lessor appealed.

Frank Mellor, for the appellant. The vesting order made by the county court judge was wrong in so far as it related to the fifth plot, which the bankrupt never mortgaged or dealt with in any way. It is true that s. 55, sub-s. 6 (1), of the Bankruptcy Act, 1883, is capable of being read in a sense which would support the order of the county court judge if the words "in any disclaimed property" be read in their widest sense. But the

(1) Bankruptcy Act, 1883, s. 55, sub-s. 6: "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose."

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settled practice of the Court is that, where there is a plot of ground which the lessee has not mortgaged nor dealt with in any way, the Court, on the trustee disclaiming the lease, vests it in the landlord if he desires it. The Court will not vest the fifth plot, in which the mortgagees of the four plots had no interest, in them or a trustee for them.

Gore-Browne, *K.C.*, and *Richard Watson*, for the respondent. The lease of September 21, 1899, was one individual property granted to the bankrupt at a rent of 150*l.* a year. If that rent had been apportioned by the appellant into five rents of 30*l.* each in respect of each of the five plots respectively, the contention on the appellant's behalf would be strong. But he refuses to apportion any of the rent. He is seeking out of the bankruptcy of the lessee to get more than he is entitled to by the terms of the lease of September 21, 1899. If the lessee had remained solvent, the appellant would only have been entitled to his rent of 150*l.* for 999 years ; or if the trustee in bankruptcy had assigned the lease instead of disclaiming it, the appellant would have had no right to take possession of any portion of the land. He is now trying to get back one-fifth of the land and to still retain the rent of 150*l.* which was payable in respect of the whole. Each of the mortgagees has under his mortgage an interest in the disclaimed property. They are therefore claiming an interest in the disclaimed property within the meaning of s. 55, sub-s. 6, of the Bankruptcy Act, 1883, and therefore the county court judge had power to make the vesting order. The mortgagees are also persons under a "liability not discharged by this Act." Any portion of the land is liable to a distress for the whole 150*l.* By introducing the power of disclaimer the Legislature created a new right, but it avoided injustice by conferring on the Court the power of vesting the property in any person to whom it might seem just that the property should be delivered by way of compensation for his liability in respect of the disclaimed property. The effect of the vesting order is that the appellant retains his right to the rent of 150*l.* a year and has a solvent tenant in the place of the bankrupt.

Frank Mellor, in reply. Where land has not been dealt with in any way by the bankrupt the effect of a disclaimer by his

trustee in bankruptcy is to give the landlord the best right to an order vesting the disclaimed land in him.

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BIGHAM J., having stated the facts, continued:—In that condition of things the four mortgagees applied to the Court through the respondent under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, for a vesting order. They were in the position that a distress might be levied upon any one of the mortgaged plots for the whole rent reserved by the lease of 1899. They applied for the vesting order as persons claiming an interest in or under a liability in respect of the disclaimed property not discharged by the Act. They were persons who would, if the disclaimer operated simply in favour of the landlord, be injured. Upon the application the county court judge made an order vesting the whole plot, including the one-fifth on which nothing had been built, in the trustee appointed by the mortgagees subject to the rent and obligations under the original lease, so that the landlord has all the rights preserved to him which he possessed before the bankruptcy, the only difference being that, instead of the contract between himself and the bankrupt, there is privity of contract and it may be also privity of estate between himself and the trustee appointed by the mortgagees, who is a solvent person. The landlord is not injured in any way, whereas the persons making the application are protected from onerous liabilities. In my opinion, in these circumstances, the order comes within the meaning of the section.

JELF J. I am of the same opinion. It is, I think, necessary to consider the object of s. 55 of the Bankruptcy Act, 1883. In the ordinary course of things leasehold property belonging to the bankrupt would pass to his trustee in bankruptcy, but it might be a "damnosa hereditas." The Legislature therefore invented the plan of giving the trustee in bankruptcy an opportunity of divesting himself of the leasehold property by disclaiming it. If there are no sub-leases no difficulty arises. The lease would simply be surrendered to the landlord by operation of law. But in many cases sub-leases have been granted. If there were a simple right on the part of the trustee to surrender the lease, the

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sub-lessee would have no compensation or rights. That condition of things would create a hardship. Sect. 55 of the Bankruptcy Act, 1883, was enacted in order to provide that the rights of sub-tenants should not, by virtue of an enactment made for the benefit of creditors, be unprovided for, but should have due consideration. I think it is the duty of the Court to take into consideration, on the one hand, the liabilities under which the sub-tenants stand, such as the liability to be ejected for forfeiture or to pay the whole rent reserved by the superior lease, or to be prejudiced in other ways, and so to be put into an unfair position, while, on the other hand, the landlord ought not to be put into an unfair position by the disclaimer. Sect. 55 refers to the property which has been disclaimed by the trustee in bankruptcy. The words are: "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property"—that, I think, means the whole of the disclaimed property—"make an order for the vesting of the property in"—that again means the whole property—"or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid"—that clearly implies that the Court, if necessary, may give the applicants something more than they were entitled to before—"or a trustee for him"—that enables, as in the present case, a simple arrangement to be made settling all the rights of the sub-tenants.

It is clear that the Court has power to make a vesting order not merely of the interest which the person making the application had in the disclaimed property before the bankruptcy, but, if necessary, it may make an order for the vesting in him by way of compensation of something which he was not previously entitled to. The power given to the Court to vest the disclaimed property in a trustee for the person making the application is a very important one. In the present case the sub-lessees made a perfectly simple arrangement under which their rights were dealt with by means of a trustee whom they appointed. Nothing is suggested against him. In my opinion

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the order made by the county court judge is within the words and spirit of the section. The lessor has the same rights as he had before and a perfectly solvent tenant instead of an insolvent one.

Appeal dismissed.

Solicitors for appellant: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Titley & Paver-Crow, Harrogate.*

Solicitors for respondent: *Burn & Berridge, for Watson, Son & Smith, Bradford.*

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[IN THE COURT OF APPEAL.]

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In re P. MACFADYEN. *Ex parte* THE VIZIANAGARAM MINING COMPANY, LIMITED.

Bankruptcy—Partnership—Breach of Trust—Director of Company and Member of Partnership—Misappropriation of Company's Assets—Proof in respect of distinct Contracts — Joint and several Contract— Joint and separate Proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 18.

Where one member of a firm, being an express trustee, wrongfully concurs in a misappropriation by the firm of the trust fund, proof may be allowed against both the joint estate of the firm and the separate estate of the defaulting trustee; and the fact that the trust fund properly came in the first instance into the hands of the firm for a specific purpose, which the firm omitted to fulfil, makes no difference in this respect; neither does it make any difference that the trust was not express and that the member of the firm had not originally possession of the trust fund.

The same principle must also apply to every case in which there is a fiduciary relationship resting upon contract, such as that of a promoter, agent, or director of a company.

In re Parkers, (1887) 19 Q. B. D. 84, followed and approved.

APPEAL from a decision of Bigham J. refusing to allow a proof against the separate estate of one P. Macfadyen.

The facts, so far as material, were shortly as follows:—

The Vizianagaram Mining Company, Limited, was an English company incorporated under the Companies Acts for the purpose (amongst other things) of developing certain mining concessions

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in India. The registered office of the mining company was in London, and one of its directors was P. Macfadyen, who was also its chairman. Art. 94 of the articles of association of the mining company provided that the firm of P. Macfadyen & Co. should be the general managers and agents of the mining company to sell the ore of the mining company upon commission.

The firm of P. Macfadyen & Co. consisted of P. Macfadyen and G. Arbuthnot, and they carried on business in partnership as merchants and bankers in London under the style of "P. Macfadyen & Co.," and at Madras under the style of "Arbuthnot & Co."

The course of business between the mining company and P. Macfadyen & Co. was as follows:—Ore was sent down from the mines to Arbuthnot & Co. at Madras, who shipped it to the various buyers, the bills of lading being made out to Arbuthnot & Co., who lodged them with their bankers at Madras, and that bank in the ordinary course of business forwarded them to their agents in London, where they would be at the disposal of P. Macfadyen & Co.

In October, 1906, P. Macfadyen & Co. became bankrupt. In the same month P. Macfadyen died, and his estate was being administered under s. 125 of the Bankruptcy Act, 1883.

After the death of P. Macfadyen it transpired that he had improperly pledged various bills of lading of the mining company's ore with his bankers for advances to his firm of P. Macfadyen & Co. to the amount of 13,000*l.*, and this amount the mining company had had to pay in order to obtain possession of these bills of lading.

The mining company accordingly lodged a proof for 13,000*l.* against the joint estate of P. Macfadyen & Co., and also a proof for the same amount against the separate estate of P. Macfadyen.

The trustee in bankruptcy rejected the proof against the separate estate, and this rejection was upheld by Bigham J.

The mining company appealed.

The appeal was heard on July 25 and 27.

Eldon Bankes, K.C., and *S. Lushington*, for the appellants. This case falls within r. 18 of Sched. II. to the Bankruptcy

Act, 1883, and the appellant company are therefore entitled to prove against the separate estate of P. Macfadyen as well as against the partnership estate. Macfadyen obviously abused the confidence reposed in him by the company as director, and it makes no difference that he was acting on behalf of the firm. He had practically the whole management of the company in his hands. As soon as he knew what was going on it was his plain duty to see that no person and no firm made an improper use of the securities. Bigham J.'s judgment seems to shew that there was no right of proof against the separate estate at all; but the company had a clear right of action against Macfadyen for what he did, because he violated his duty towards them, and this breach of duty arose out of contract. The liability of a trustee in respect of a breach of trust is provable in bankruptcy as a liability arising from a contract to perform his trust, and not from pure tort; it is an equitable debt or liability in the nature of a debt: *In re Parkers* (1); *Emma Silver Mining Co.* v. *Grant* (2); *Ex parte Adamson* (3); *Lord Mountford* v. *Lord Cadogan* (4); *Parker* v. *McKenna* (5); and as regards assets which have been entrusted to his hands or which are under his control a director is a trustee: *In re Forest of Dean Coal Mining Co.* (6) Probably Macfadyen's action amounted to a tort also, but it is competent for the company to waive the tort and proceed on contract.

Scrutton, K.C., and *Hansell*, for the trustee in bankruptcy. Rule 18 is an exception to the general rule against double proof. The general rule is that in the case of the bankruptcy of a firm and the individual partners thereof a creditor can only prove against one estate; he must elect whether he will rank as a joint creditor or as a separate creditor: Lindley on Partnership, 7th ed. p. 816. The exception in r. 18 is confined to the case where there is a contract with the firm and a separate contract with the partner. Here the appellants employed the firm as agents; there was no separate contract with any partner in the firm. The firm ship the ore and take bills of lading

(1) 19 Q. B. D. 84.
(2) (1880) 17 Ch. D. 122, 130.
(3) (1878) 8 Ch. D. 807, 819.
(4) (1816) 19 Ves. 635, 638.
(5) (1874) L. R. 10 Ch. 96, 116.
(6) (1878) 10 Ch. D. 450, 453.

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making the goods deliverable to themselves, and the firm borrow money for their own purposes on those bills of lading. Apart from Macfadyen's directorship there is a claim in contract against the firm and no claim in contract against the partner. The action of Macfadyen is the action of a partner in the firm for the benefit of the firm. Then what difference does it make that the man who is carrying on the business of the firm is also a director of the company? He does not purport to be acting as director; it was the firm's business throughout; the firm alone received those bills of lading and dealt with them for the firm's purposes. In *In re Parkers* (1) the property was in the hands of the trustee himself, and, further, that decision is limited to the case of an express trustee. The distinction between a director and a trustee is insisted upon in *Smith* v. *Anderson* (2) and in *In re Forest of Dean Coal Mining Co.* (3)

Lushington, in reply. A director is in the position of a trustee and is liable not only for what he puts into his own pocket, but for what in breach of trust he pays to others: *Flitcroft's Case.* (4)

[He was stopped.]

Cur. adv. vult.

July 31. COZENS-HARDY M.R. This is an appeal from a decision of Bigham J. refusing to allow a proof against the separate estate of P. Macfadyen for a large sum in respect of which a proof has been allowed against the joint estate of the firm in which P. Macfadyen was a partner. [Having stated the facts as above, his Lordship continued:—]

The general rule against double proof must prevail unless the case falls within r. 18 of Sched. II. of the Bankruptcy Act, 1883. It is, I think, well settled that if one member of a firm, being an express trustee, wrongfully concurs in a misappropriation by the firm of the trust funds, a proof may be allowed both against the joint estate and against the separate estate; and it would make no difference if the trust funds properly came into the hands of the firm in the first instance for a specific purpose which the firm omitted to fulfil. The judgment of

(1) 19 Q. B. D. 84.
(2) (1880) 15 Ch. D. 247, 275.
(3) 10 Ch. D. 450, 453.
(4) (1882) 21 Ch. D. 519, at p. 535.

Cave J. in *In re Parkers* (1) is a clear authority on the point that r. 18 covers such a case, and, so far as I am aware, his decision has never been questioned.

Can it make any difference that the trust was not express, and that the member of the firm had not originally possession of the trust fund? I think not. The same principle must apply to every case in which there is a fiduciary relation resting upon contract, such as a promoter or an agent; nor can I except the position of a director of a company. It is true that it is not his duty to have the property of the company vested in him, and he is not a trustee of the property of the company unless it is vested in him. But it is equally true that it is his duty not to apply to his own use, or to the use of his firm, property which he knows to belong to the company. I entertain no doubt that in old days a bill in Chancery might have been maintained by the company as plaintiff against a director as sole defendant, alleging simply that certain property of the company had come into the possession or subject to the control of the defendant, and that the defendant with full knowledge of the facts had wrongfully and in breach of his duty applied the property to his own use or to the use of his firm. It would be wholly irrelevant to allege that it did, or did not, come into his possession or subject to his control as director. If he picked up in the street bearer bonds which he knew to belong to the company and to have been dropped by a clerk on his way to the bankers, he would be just as liable as if the bonds had been handed to himself for delivery. Whether he would have been liable in an action of trover and conversion I care not. He would have been liable and accountable in equity. If I am right in the view that, in the case I have put, the director could have been made liable for a breach of his fiduciary duty in a Court of Chancery, it seems to follow that P. Macfadyen was guilty of a breach of trust towards the company. He was guilty, not of negligence in not safeguarding the interests of the company, but of actual and active dealing with the bills of lading in a manner which he knew to be wrongful. The case falls within the principle of *In re Parkers* (1), and double proof ought to be allowed.

(1) 19 Q. B. D. 84.

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The settled practice which allows a proof in bankruptcy in respect of a breach of trust shews, what cannot really admit of doubt, that the liability of a trustee for breach of trust is founded on contract and not on tort.

Bigham J. stated that he felt great doubt. With the utmost respect, I think he was wrong in considering that, as Macfadyen had no duty to deal with these bills of lading in his character of director, that duty being imposed upon his firm, he was therefore not accountable to the company for a breach of trust.

In my opinion the appeal must be allowed.

FARWELL L.J. No double proof is allowed for debts in respect of which the debtor is jointly and severally liable, unless r. 18 of Sched. II. of the Bankruptcy Act, 1883, applies.

In the present case Macfadyen was a member of the firm of P. Macfadyen & Co., and as such was liable for the bills of lading which were transmitted to his firm in their capacity of agents of the company; but Macfadyen was also a sole contractor within the meaning of the rule, because he was a director of the company, and as such stood in a fiduciary relation to the company—a relation founded on contract quite distinct from the contract binding him as a member of the firm. It is plain that contract lies at the root of the liability of every person of whom it can be rightly predicated that he stands in a fiduciary relation to another, whether such person be called trustee, promoter, fiduciary agent, or otherwise.

In *Emma Silver Mining Co.* v. *Grant* (1), which was a claim against a promoter for secret profit, Jessel M.R. says (2): "Besides, this sum of money does arise from a contract—that is to say, a contract of agency, or promotion, or trusteeship—call it what you like. Under that contract he became liable for the sum he received in that character; and he is liable to account for it by reason of that contract. It seems to me a clear case arising from contract. The liberty given in the old form of decree in the Court of Chancery, to prove against the estate of a bankrupt trustee, was always put on the ground that the trustee contracted to perform his trust, and therefore his liability was

(1) 17 Ch. D. 122. (2) Ibid. at p. 130.

always treated as a liability arising from a contract, and not from what I will call pure tort." And James L.J. in *Ex parte Adamson* (1) says: "But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated."

The relation of a director to his company is twofold: under some circumstances he is a trustee, under others he is an agent. In this case he falls clearly within the category of trustee as defined by Lindley L.J. in *In re Lands Allotment Co.* (2): "Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control."

The bills in this case were the property of the company and were undoubtedly under the actual control of the bankrupt director. The case is, in my opinion, undistinguishable from *In re Parkers* (3), and that case, in my opinion, was rightly decided.

KENNEDY L.J. In my opinion the judgment of Bigham J. in the present case ought not to be affirmed. There is a general rule against double proof. In order to bring a case within the special provisions of r. 18 of Sched. II. of the Bankruptcy Act, 1883, there must be proved a contract with those on whose joint estate it is sought to prove, and of course a breach of that contract, and, further, a contract with the person on whose separate estate it is sought to prove, and a breach of that contract. In the case of *In re Parkers* (3) it was held by Cave J. that there was such a right of proof where the separate estate was that of a trustee of a marriage settlement, and the joint estate was that of a firm of solicitors into whose hands the moneys had come for the purposes of investment on mortgage,

(1) 8 Ch. D. 807, at p. 819. (2) [1894] 1 Ch. 616, at p. 631.
(3) 19 Q. B. D. 84.

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and who had improperly applied moneys forming part of those trust funds. In his judgment at p. 87 of the report the learned judge quotes and recognizes earlier authorities shewing that the liability of an express trustee arises out of a contract which springs from that trustee having undertaken the trust. Now there is no question here that P. Macfadyen was, with his partner, guilty of dealing improperly with the bills of lading which were the indicia of the property of the firm of which he was a director, the goods having been shipped to London, and being goods with which neither P. Macfadyen nor his partner were justified in dealing as they did.

The only question that remains is whether, in regard to the legal position and responsibilities of a director such as P. Macfadyen was, they are or are not so far identical with those of a trustee, as recognized in the judgment of Cave J., that they do impliedly involve a contractual duty on the part of the director arising out of his undertaking the office of director. Had he been a trustee under an express trust according to the judgment which has been cited, and which is unquestioned and in which we all entirely agree, there could be no doubt of this having been a case in which, under r. 18 of Sched. II., there would have been a right in the company of double proof. It seems to me that we ought to hold that there is such an identity.

There are, of course, distinctions between a director and a trustee which were pointed out by James L.J. in *Smith* v. *Anderson*. (1) But, as I understand the law, "the liability of a director for the misapplication by him of the money of the company closely resembles the liability of a trustee for a breach of trust, and is indeed often designated as such." Those are the words of Lord Lindley at p. 527 of the first volume of his book on the Law of Companies; and in *Marzetti's Case* (2) Cotton L.J. laid down the law that directors are "confidential agents with the liabilities of trustees, but having a large discretion." It appears to me, therefore, that if in each case there is a contractual liability, and if, as in the present case, the director has not only been guilty of negligence but of an active breach of trust in regard to the property of his company, there is a

(1) 15 Ch. D. 247, at p. 275. (2) (1880) 42 L. T. 206, 209.

right to prove against his separate estate as well as a right to prove in the joint estate of those with whom as a partner he co-operated in the commission of the wrong which was also a breach of contract.

Appeal allowed.

Solicitors: *Freshfields; Stibbard, Gibson & Co.*

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[IN THE COURT OF APPEAL.]

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BAKER *v.* SNELL.

Savage Dog—Personal Injury—Liability of Owner—Scienter—Intervening Act of Third Person—Remoteness of Damage—Master and Servant—Scope of Employment.

The owner of a dog known by him to be savage entrusted it to the care of a servant, who incited it to attack the plaintiff, and thereupon the dog bit the plaintiff, who brought an action against the owner in the county court for damages. The county court judge having non-suited the plaintiff:—

Held, that the action must go down for a new trial on the ground that the question whether the servant was acting within the scope of his employment ought to have been left to the jury, and by Cozens-Hardy M.R. and Farwell L.J. (Kennedy L.J. dissenting) on the further ground that a person keeping an animal feræ naturæ, or an animal mansuetæ naturæ which is known to him to be savage, is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person.

Decision of Divisional Court, [1908] 2 K. B. 352, affirmed.

APPEAL from the Divisional Court (Channell and Sutton JJ.). (1)

The plaintiff was a housemaid in the employment of the defendant, a licensed victualler. The defendant kept upon his premises a dog which was known by him to be savage. It was the duty of the defendant's potman to let the dog out early in the morning, and then chain it up again before the plaintiff and the barmaids came downstairs. On the occasion in question

(1) Ante, p. 352.

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the potman brought the dog into the kitchen, where the plaintiff and the barmaids were at breakfast, and said, "I will bet the dog will not bite any one in the room." He then let the dog go and said, "Go it, Bob." The dog then flew at the plaintiff and bit her. It had previously bitten the plaintiff and other persons to the defendant's knowledge. The plaintiff thereupon commenced this action for damages in the Bow County Court. The county court judge held that the act of the potman was in fact an assault, for which the defendant was not liable, and he accordingly nonsuited the plaintiff. The plaintiff appealed, and the Divisional Court ordered a new trial, Channell J. on the ground that it was a question for the jury whether the potman was acting within the scope of his employment, Sutton J. on the ground that the owner of an animal known to him to be savage keeps it at his peril and is liable for any injury done by it, even though the injury is directly brought about by the wilful act of a third person.

The defendant appealed.

McCall, K.C. (with him *Abinger*), for the defendant. 1. The potman in setting the dog on to the plaintiff was guilty of a clear departure from duty which could not make his master liable; he was acting outside the scope of his authority, and the master can be under no greater liability than if the act had been done by a stranger: *Cheshire* v. *Bailey* (1); *Sanderson* v. *Collins*. (2)

2. The owner of a ferocious dog is only bound to take reasonable care that people shall not be hurt; there is no case which says that the owner is liable where the immediate cause of the injury is the unauthorized and criminal act of a third party.

[FARWELL L.J. referred to *Fletcher* v. *Rylands*. (3)]

It may be that the liability of the owner of a ferocious dog is not so high as that of the owner of an undomesticated animal of a naturally dangerous class. *Filburn* v. *People's Palace and Aquarium Co.* (4) is not inconsistent with this view. In *May* v. *Burdett* (5), on which Sutton J. relied, the mind of the Court was not directed

(1) [1905] 1 K. B. 237, 245.
(2) [1904] 1 K. B. 628.
(3) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
(4) (1890) 25 Q. B. D. 258.
(5) (1846) 9 Q. B. 101.

to the case of an injury directly resulting from the criminal act of a third party. Here the immediate cause of the injury was the assault of the potman. [He also referred to *Barnes* v. *Lucille*. (1)]

Profumo, for the plaintiff. The wrong consists in keeping the animal after knowledge of its vicious propensities. If the owner of the animal knows that it is savage he keeps it at his peril, and if the animal does any mischief the injured party can maintain an action for damages against him without proof of negligence; the scienter is the gist of the action: *Nichols* v. *Marsland* (2); *Rylands* v. *Fletcher* (3); *Smith* v. *Pelah* (4): *Stiles* v. *Cardiff Steam Navigation Co.* (5); *May* v. *Burdett* (6); *Jackson* v. *Smithson*. (7) In *Smith* v. *Pelah* (4) it was ruled by Lee C.J. that if a person kept a dog after notice that it had bitten a man an action would lie against him at the suit of a person who was bitten "though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice." The only case in which the owner of a dog has been held not liable after notice that it was fierce is *Brook* v. *Copeland* (8), where the defendant, a carpenter, kept a dog for the protection of his yard and let him loose at night, and the plaintiff, who was the defendant's foreman, went to the yard at night, after it was shut up, and got bitten; and no doubt where the injury is due to the wanton act of a person going into the cage or kennel where the dangerous animal was confined the owner would not be liable. Although there is no decision precisely in point, the authorities seem to shew that the liability of the owner extends to a case where the immediate cause of the injury is the intervening act of a third party. Even apart from this proposition the case ought to go down for a new trial, for it may well have been that the dog would have bitten the plaintiff although it had not been set on.

Abinger, in reply. *Smith* v. *Pelah* (4) is disapproved in *Charlwood* v. *Grieg*. (9)

(1) (1907) 96 L. T. 680.
(2) (1875) L. R. 10 Ex. 255, 260; (1876) 2 Ex. D. 1.
(3) L. R. 3 H. L. 330, 339.
(4) (1747) 2 Str. 1264.
(5) (1864) 33 L. J. (Q.B.) 310.
(6) 9 Q. B. 101, 111, 112.
(7) (1846) 15 L. J. (Ex.) 311.
(8) (1794) 1 Esp. 203.
(9) (1851) 3 Car. & K. 46.

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BAKER v. SNELL.

COZENS-HARDY M.R. This is an appeal from a decision of the Divisional Court directing a new trial of an action commenced in the county court by a young woman who had been bitten by a dog owned by her master and known by that master to be ferocious and given to bite. [The Master of the Rolls stated the facts and continued:—] The learned county court judge nonsuited the plaintiff on the ground that the conduct of the barman who had the dog in charge amounted to an assault by him. In the Divisional Court both the learned judges thought that there had not been a satisfactory trial and that the action must go down for a new trial. Channell J. based his decision on the ground stated in the following passage: "The potman was the defendant's servant, and was entrusted by him with the custody of the dog. Instead of performing his duty of keeping the dog securely, he incited it to fly at the plaintiff. The question whether the defendant is liable for that depends upon whether the man's wrongful act was done in the course of his employment, or whether it was done for purposes of his own. If it could be shewn that the man did it maliciously to gratify some grudge against the plaintiff, his master would not be liable. But there was no evidence of that. In my view the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe; and if that is the right view, the defendant would be responsible. But the question is one of fact which ought to have been left to the jury." I entirely adopt that view, and that, no doubt, is in itself a sufficient reason for affirming the decision of the Court below, but as a matter of wider interest has been raised, and as it has been dealt with by both Channell and Sutton JJ., I think it right to state, shortly, my view on the point. If a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious, but which is known to the owner to be dangerous, is the owner of that animal liable only if he neglects his duty of keeping it safe or is negligent in the discharge of that duty, or is he bound to keep it secure at his peril? In my opinion the latter is the correct proposition of law, and I think that it is not open to the Court to decide the other way. In 1846, in *May* v. *Burdett* (1),

(1) 9 Q. B. 101, 111, 112.

the law was laid down by the Court of Queen's Bench in the case of a monkey. The action was brought by a man and his wife to recover damages for a bite to the female plaintiff, and the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large, and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff. The case was elaborately argued. Lord Denman C.J., delivering the judgment of the Court, said (1): "A great many cases and precedents were cited upon the argument: and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities." And again, at the end of his judgment, after referring to a passage in Hale's Pleas of the Crown, vol. 1, p. 430b, he says: "It was said, indeed, further, on the part of the defendant, that, the monkey being an animal feræ naturæ, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control: but we cannot allow any weight to this objection: for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it: we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events." The next case in point of time was *Jackson* v. *Smithson* (2), which raised the point in a very neat form. The action was brought by a husband and wife for injury to the wife, and the declaration alleged that the defendant did wrongfully and

(1) 9 Q. B. 101, at p. 110. (2) 15 L. J. (Ex.) 311.

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injuriously keep a certain ram, he (the defendant) well knowing that the said ram then was and continued to be prone and used and accustomed to attack, butt, and injure mankind. There was no allegation of negligence, no allegation beyond this, that the defendant knew that the ram was prone and used and accustomed to attack and injure mankind, and that he wrongfully kept it. Judgment was given in favour of the plaintiff at the assizes, and a rule nisi was obtained to arrest the judgment on the ground that the declaration was bad for omitting to aver that the defendant negligently kept the ram. The matter came before the Court of Exchequer, consisting of Pollock C.B. and Alderson and Platt BB. Pollock C.B. said: "The case of *May* v. *Burdett* (1), in the Queen's Bench, is decisive, and we must leave the parties to go to a Court of error, if they think that they have any ground for reversing our judgment, by which this rule is discharged." Alderson B. said: "I am of the same opinion, and think that we are bound by that case. I can see no distinction between the case of an animal which breaks through the tameness of its nature, and is known to be fierce, and one that is feræ naturæ." Platt B. said: "No doubt a man has a right to keep an animal which is feræ naturæ, and no one has a right to interfere with him in doing so, until some mischief happens; but as soon as it has done an injury, then the keeping it becomes, as regards that person, an act for which he is responsible." The matter came up again, not directly, but in a shape which led to some observations by the Court, in *Nichols* v. *Marsland*. (2) It was held there that a man who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbour if the escape be caused by an agent beyond his control. The judgment of the Court in that case, which consisted of Kelly C.B. and Bramwell and Cleasby BB., was delivered by Bramwell B., and the whole reasoning of the judgment seems so apt that I think I ought to refer to it in some detail. He says: "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the

(1) 9 Q. B. 101. (2) L. R. 10 Ex. 255.

water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then, if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be." Then, after saying that for such a question there was no difference between a reservoir and a stack of chimneys, he continued: "The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion." And later in his judgment he says: "This case differs wholly from *Fletcher* v. *Rylands*. (1) There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that, if a man kept a tiger, and lightning broke his chain and he got loose and did mischief, the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case." That case came before the Court of Appeal (2), where Mellish L.J., delivering the judgment of the Court, says: "The ordinary rule of law is that, when the law creates a duty and the party is disabled from performing it without any fault of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right

(1) L. R. 10 Ex. 255. (2) L. R. 2 Ex. D. 1.

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to hold that a person could not escape from the consequences of his own wrongful act." If it be true, as I think it is, that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is an authority, not merely of the Court of Exchequer, but also of the Court of Appeal, that the person so keeping it is liable for the consequences of his wrongful act, even though the immediate cause of damage is the act of a third party. The case of *Filburn* v. *People's Palace and Aquarium Co.* (1) is also a strong authority for the same proposition. In that case the action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant which was the property of the defendants and was being exhibited by them. The defendants did not know the elephant to be dangerous, but they were nevertheless held liable because the elephant was of a class of animals which were dangerous by nature. Lord Esher said in his judgment in that case that the law recognized two distinct classes of animals, animals which were dangerous by nature and animals which were generally not dangerous; but where animals of the latter class were dangerous to the owner's knowledge, he put them into the same class as animals which were dangerous by nature. Then, after referring to certain descriptions of animals which were not dangerous, he continued: "Unless an animal is brought within one of these two descriptions—that is, unless it is shewn to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shewn by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." On these authorities, and in accordance with what in my judgment is settled law, I think that the matter ought to go down for a new trial, not merely on the

(1) 25 Q. B. D. 258.

ground stated by Channell J., though I agree that is sufficient, but also on the ground as to which he expressed some doubt, but on which Sutton J. appears to have based his decision.

FARWELL L.J. I agree. I take the same view as Channell J. did as regards the potman's authority, but I do not agree with him in thinking that the liability of the keeper of a savage animal does not extend to damage directly brought about by the intervening voluntary act of a third party. Sutton J. also did not agree with him, because he bases his judgment upon *May* v. *Burdett.* (1) The cases, in my opinion, establish that the law recognizes two classes of animals—animals feræ naturæ and animals mansuetæ naturæ. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and any one who keeps an animal of that nature does a wrongful act and is liable for the consequences under whatever circumstances arising, except where the plaintiff by his own conduct has brought the injury upon himself. That is laid down in *Jackson* v. *Smithson.* (2) The exact point of that decision was that an action for injury caused by a ram known to its owner to be dangerous would lie without any averment of negligence, because the wrongful act was keeping a savage beast. The same principle was laid down by Lord Denman in *May* v. *Burdett.* (1) Lord Denman in his judgment refers with approval to a passage in Hale's Pleas of the Crown, vol. 1, p. 430b, which concludes as follows: "And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." It appears to me to be absolutely immaterial if the keeper of a dangerous animal keeps it at his own peril in all circumstances whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast, and the person who keeps it is prima facie responsible for the injury arising from his wrongful act, and such prima facie responsibility can be got rid of only in the manner pointed out by Blackburn J.,

(1) 9 Q. B. 101. (2) 15 L. J. (Ex.) 311.

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namely, by shewing that the escape was due to the plaintiff's own default, or perhaps was caused by vis major or the act of God. The wrongful act of a third person is no defence.

KENNEDY L.J. This case I agree should go down for a new trial. But I desire to add, in regard to certain other points which have been dealt with both here and in the Court below, that, as at present advised, I agree with the view of Channell J., which I think is in accordance with the authorities. There is no doubt that the keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal. That appears from the judgment of Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co.* (1) He says: "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief." I infer from that that a dog known by its owner to be dangerous is exactly in the same position as an animal feræ naturæ. But there is nothing culpable or wrong in keeping an animal feræ naturæ. That appears from *Jackson* v. *Smithson*. (2) Platt B. there says: "No doubt a man has a right to keep an animal which is feræ naturæ and no one has a right to interfere with him until some mischief happens." But then it is said that directly the animal does do mischief the person who keeps him is liable, and I do not doubt that that is true in this sense, that it does not lie on the injured party to allege and prove affirmatively any want of care on the part of the keeper. The gist of the action is the scienter, and in *Jackson* v. *Smithson* (2) it was held a good declaration that an animal known by the defendant to be ferocious was kept by him and did damage. The same thing was decided in *May* v. *Burdett*. (3) There also the

(1) 25 Q. B. D. 258.
(2) 15 L. J. (Ex.) 311.
(3) 9 Q. B. 101.

declaration was held good although there was no allegation of negligence. But the very language of Lord Denman which has been referred to by the Master of the Rolls appears to me to be in favour of the view of the law expressed by my brother Channell, because he (Lord Denman) states the result of the authorities to be "that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal without any averment of negligence or default in the securing or taking care of it." The very introduction of the term "prima facie" shews that, in the opinion of Lord Denman, there may be an answer to the action; that the keeping of such an animal with knowledge of its propensities is not conclusive, although the keeper is prima facie liable. Those words could not, in my opinion, be properly used if the view is correct that whatever happens the owner is liable, if, for example, to use Channell J.'s illustration, the animal was set on by a thief to bite a policeman who was following him. That being so, upon the whole, as at present advised, I am inclined to agree with my brother Channell in declining to accept the view intimated by Bramwell B. in *Nichols* v. *Marsland* (1), that the liability of the keeper of a savage animal extends to damage directly brought about through the intervening voluntary act of a third person. I may observe that Bramwell B.'s view is indeed put by Channell J. a little more strongly than the words actually used by the learned baron seem to warrant, because all that he said was "I am by no means sure," &c. Whatever may be the value of that dictum, I desire to say that, if authority be referred to, we have the authority of Blackburn J., delivering the judgment of the Court of Exchequer Chamber in *Fletcher* v. *Rylands* (2), for saying that, whatever a man keeps which is likely to do mischief, he is subject to an equal degree of liability, and that judgment was expressly referred to and approved by Lord Cairns in the House of Lords. (3) Blackburn J. says (I am reading from the extract in Lord Cairns' judgment in the House of Lords): "We think that the true

(1) L. R. 10 Ex. 255. (2) L. R. 1 Ex. 265.
(3) L. R. 3 H. L. 339, 340.

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rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." That does not mean that the owner is liable in all cases, for he proceeds to mention two cases in which the owner might not be liable. "He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God." Then later on in his judgment he shews that no distinction can be drawn between the various classes of things which may cause mischief if allowed to escape. After giving several instances in which a man would be responsible for bringing a dangerous thing on his property in the event of its escape, he goes on: "But for his action in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches." Then Lord Cairns adds, "My Lords, in that opinion I must say I entirely concur." Therefore he fully indorses the opinion of Blackburn J. that a wild beast is to be regarded in the same light as anything else which may do harm if allowed to escape. If so, it appears to me to follow that the view rather doubtfully expressed by Bramwell B. cannot be law. Granted that it is not unlawful for a man to keep an animal feræ naturæ, but, if it injures his neighbour, the keeper of the animal is prima facie liable for the result, the question here is whether the intervening criminal act of a third person is one of those things which, if proved by the defendant to have been the direct cause of the injury, would absolve the owner from his prima facie liability. The inclination of my own opinion is that it would. It is not necessary to decide the point in this case, but speaking for myself, with great deference to the other members of the Court, I should have thought that not only on grounds of justice, but according to the law as stated by Lord Denman and Blackburn J., if it could be shewn that it

was the criminal act of a third party which made the animal dangerous, and the injury to the plaintiff was the direct result of that act, the keeper of the animal would have a good defence to an action such as the present.

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Appeal dismissed.

Solicitors: *Philbrick & Co.; H. F. Strouts.*

H. B. H.

[IN THE COURT OF APPEAL.]

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HAYLETT *v.* VIGOR & CO.

Employer and Workman—Compensation—Death caused by Industrial Disease —"Lead Poisoning or its sequelæ"—Proximate or ultimate cause of Death —Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-ss.* 1 *and* 2, *Sched. III.*

In order to bring the case of a deceased workman within the operation of s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, which section applies the Act to industrial diseases, it must be established that a disease mentioned in the third schedule to the Act was either the proximate or ultimate cause of his death. It is not sufficient that the death was caused by a complaint which might in some cases be a sequela of the disease but might also be a sequela of something else. It must be proved that the death was at least a remote consequence of the disease in the case of the particular individual.

Sub-s. 2 of the section has no effect until the case has been brought within the operation of sub-s. 1.

APPEAL from an award of the judge of the county court at Bow, Middlesex, sitting as arbitrator under the Workmen's Compensation Act, 1906, in favour of the dependants of a deceased workman.

The deceased was a painter, and had worked for many years for Messrs. Crabtree. For three or four days in August, 1907, he worked for Messrs. Vigor & Co., the first defendants. In September there were signs that he was suffering from "plumbism." He was removed to a hospital on September 25, but all traces of plumbism had before that date passed away.

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He died on October 2. His dependants claimed compensation under s. 8 of the Act. The material portions of that section are as follows:—"8. (1.) Where (i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this Act . . . . or (iii.) the death of a workman is caused by any such disease; and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment. . . . . (2.) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the third schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment unless the employer proves the contrary." In the third schedule in the first column, "Description of Disease," there appear, inter alia, "Lead poisoning or its sequelæ," and in the second column, "Description of Process," "Any process involving the use of lead or its preparations or compounds." The county court judge found (1.) that the immediate cause of death was granular kidney; (2.) that granular kidney is a sequela of lead poisoning, but is also a sequela of gout, of alcoholism, heart pressure, and other complaints; and (3.) that lead poisoning was not proved to have been the cause of the granular kidney or of the death, but that, on the other hand, the employers did not prove that it was not the cause of death. Upon this finding the county court judge held that the applicants had established their right to compensation and awarded 260*l.* against Messrs. Crabtree, the second defendants.

Against this decision Messrs. Crabtree appealed.

J. A. Simon, K.C., and *Frank Mellor*, for the appellants. The decision of the county court judge is wrong. He did not find that the granular kidney from which the deceased died was in fact consequent upon lead poisoning. The sequelæ of lead poisoning are numerous and may be produced by something else. The fact that a man has died from a disease which is among the sequelæ of lead poisoning does not entitle his dependants to compensation under the Act unless it is proved that the complaint from which he died was in his particular case consequent upon lead poisoning. The object of inserting the words "or its sequelæ" in the schedule to the Act was to prevent an employer from evading his liability to pay compensation on the ground that his employee had died not actually from the scheduled disease, but from a complaint which supervened or was consequent upon it.

Further, it is submitted that painting is not a "process" within the section. The duty of the certifying surgeon is confined to factories or workshops. The operation of this section is limited to the industrial use of lead in a factory or workshop.

C. A. Russell, K.C., and *Harold Morris*, for the respondents. The section cannot be confined in its operation to processes under the Factory Act.

[COZENS-HARDY M.R. We do not wish to hear you upon that point.]

The schedule is merely descriptive of certain diseases. The effect is the same as if the various sequelæ had been set out nominatim. The words "and its sequelæ" are intended to save such an enumeration. It is said that in order to entitle the respondents to succeed the deceased must have died from lead poisoning or from some complaint proved in his particular case to be a sequela of lead poisoning. There is nothing to justify such a reading of the section. Sub-s. 2 throws upon the employer the burden of proving that the disease was not due to the nature of the employment.

Simon, K.C., in reply. If the contention on behalf of the respondents is right, they would be entitled to succeed even if it were proved that the deceased had never suffered from lead

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poisoning at all. The meaning of "sequela" is "consequence." It must be proved that the death was caused by a disease which in the given case was consequent upon lead poisoning. Sub-s. 2 has no effect until a case is brought within the operation of sub-s. 1.

Cur. adv. vult.

July 31. COZENS-HARDY M.R. (after stating the facts as above set-out). The question turns upon the true construction of s. 8, sub-ss. 1 and 2, and, so far as I am aware, this is the first case in which that section has been considered in this Court. Now the section has no application unless Haylett's death was "caused by" a "disease mentioned in the third schedule." The material words in the third schedule are "lead poisoning or its sequelæ." In my opinion these words have no operation unless it is established to the satisfaction of the county court judge that lead poisoning was either the proximate or the ultimate cause of death. It is not sufficient that death was caused by something which may in some cases be a sequela of lead poisoning but may also be a sequela of gout or alcoholism. In short, it must be proved that death was a consequence of lead poisoning in the case of this particular individual, not necessarily a direct or immediate consequence, but at least a remote consequence. Now all that is proved is that Haylett died of granular kidney. That does not suffice to bring the case within the operation of the section. But it was argued that sub-s. 2 enlarges the scope of the section and throws upon the employer the burden of proof. I am unable to follow the argument. That sub-section presupposes death caused by a disease mentioned in the third schedule and in no way alters the operation of sub-s. 1. When once it has been proved that death was caused by lead poisoning or its sequelæ, in the sense in which those words must be interpreted, then the burden of proof is thrown upon the employers of the deceased painter to make out that the death was not due to the nature of the employment at the date of the disablement. It was under this sub-section that Messrs. Vigor, who were Haylett's last employers, were relieved from responsibility by the learned county court judge. This sub-section does not create a liability. Its only

use is to saddle the liability upon the proper person. It deals only with evidence, and it has no effect whatever until the applicant has brought the case within the operation of the earlier part of the section. For these reasons, with the utmost respect to the very careful and learned county court judge, who took a different view, I am of opinion that the appeal ought to be allowed.

FARWELL L.J. The only finding in this case is that the deceased died from granular kidney. Now on the evidence granular kidney is due most frequently to gout, next to alcohol, and last to lead poisoning. The disease mentioned in the schedule is lead poisoning or its sequelæ, but granular kidney may or may not be a sequela of lead poisoning in any given case, and the onus of shewing that it is so lies on the person asserting it. It is clear, if sequelæ be translated into plain English and called "or its consequences"—i.e., the consequence, not a possible consequence—the allegation then is that the man died not from lead poisoning, but from the consequence of lead poisoning, and it is as necessary for him to prove this case as it would be for him to prove that he had died from lead poisoning if that had been the case. The schedule cannot be read as if the words were "lead poisoning or granular kidney"; it can only be "lead poisoning or granular kidney produced by or consequent on lead poisoning." It is impossible to have the consequence without the cause, which is the gist of the liability. If this were not so, it would be sufficient for the claimant to shew that the deceased died of granular kidney without any evidence of lead poisoning at all, and leave it on the employer to prove the negative. Sub-s. 2 has no application to a case like the present; it only comes into operation when lead poisoning or a disease consequent on lead poisoning has been proved, and it then raises an inference in favour of the claimant that, lead poisoning, as either the immediate or ultimate cause of death, being proved, such disease was caused by employment in work where lead was handled, an inference which is reasonable enough if death is proved to have been due to lead poisoning directly, or as the causa causans, but quite unreasonable if death may more

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probably or as probably have resulted from gout or alcohol, and no evidence of lead poisoning at all has been given.

KENNEDY L. J. I am upon the whole of opinion that the view of the effect of s. 8, sub-ss. 1 and 2, and the third schedule of the Workmen's Compensation Act, 1906, for which the appellants' counsel contended is more reasonable than that which found favour with the learned county court judge. He has treated "lead poisoning or its sequelæ" as meaning lead poisoning or any disease which may be a sequela or consequence of lead poisoning; and so, as unquestionably granular kidney, which was the immediate cause of the death of the workman, is an extremely common sequela of lead poisoning, he held that under s. 8, sub-s. 2, he was entitled to deem the disease to have been due to the nature of the deceased's employment, unless the employer proved the contrary. On the medical evidence the learned judge has stated his finding to be that, on the one hand, lead poisoning was not proved to have been the cause of the granular kidney, and, on the other hand, that the employers, in the course of whose service the deceased was employed in a process involving the use of lead or its preparations or compounds mentioned in the second column of the third schedule, had not proved that lead poisoning was not the cause of death. Therefore, but for the application of s. 8, sub-s. 2, in regard to the burden of proof, he would have been bound to decide against the claimants; but reading the first column of the third schedule as he did, and applying s. 8, sub-s. 2, he decided in their favour. The appellants argue that this was wrong, because the words of the third schedule ought, they contend, to be read "Lead poisoning or any disease which not only may be, but in the particular case is shewn to have been, a sequela of lead poisoning," and therefore s. 8, sub-s. 2, as to the burden of proof cannot be applied until it is proved, as it was not in the present case, that the disease causing the workman's disablement or death was in fact the sequela, or in more popular language the result, of lead poisoning. The first column of the schedule appears to me to be unfortunately ambiguous, and I hope that it may be amended, and I was at first rather inclined to give to the words

"or its sequelæ" the wider interpretation for which the respondents contend, and which commended itself to the very careful and learned county court judge. Upon further consideration, however, seeing the heavy and unusual burden of disproof which that construction would cast upon the employer, and the reasonableness prima facie of requiring the claimant to prove affirmatively that the disease from which the workman is disabled or has died was connected as a result with some bodily affection (in the present case lead poisoning) which might naturally be expected to arise out of the process in which the workman had been employed, I think that the appellants' interpretation of the statute is the more reasonable. The insertion in column 2 of the third schedule of the words "or its sequelæ" may have been deemed advisable in order to exclude any argument on the part of the employer that although it was proved that the disease from which the workman was disabled or died was a result of lead poisoning, yet, as lead poisoning was not the proximate cause of the disablement or death, but only its remote cause, the employer was not liable to pay compensation under this statute. A further and different point was mentioned to us by the appellants, namely, that this s. 8 applies only to cases in which the "process" mentioned in the third schedule is carried on under conditions to which the Factory and Workshops Act, 1901, would be applicable. It seems to me that language is used in portions of s. 8, sub-ss. 1 and 2, which appears to lend some support to such a contention; but it is unnecessary to decide the question in the present case, and I mention it only that it may not be inferred from silence in regard to it that I have formed a definite opinion against such an interpretation of this portion of the statute.

Appeal allowed.

Solicitors for appellants: *William Hurd & Son.*
Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

G. A. S.

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[IN THE COURT OF APPEAL.]

CONWAY *v.* WADE.

Trade Union—Member of Union—Workman—Debt due to Union—Interference with Employment—Threatening Employers—"Trade Dispute"—In Contemplation or Furtherance of a Trade Dispute—Trade Disputes Act, 1906 (6 *Edw.* 7. *c.* 47), *ss.* 1, 3; *s.* 5, *sub-s.* 3.

In 1900 the plaintiff, a member of a trade union, was fined 10*s.* for a breach of the union rules; this fine was not paid. In 1907 the plaintiff joined another branch of the union, and was in employment with other union men as a boiler scaler. The defendant, who was the district delegate of the union, at the instigation of some of the plaintiff's fellow-workmen who knew of the unpaid fine, and of the treasurer of the branch of the union which had imposed it, went to the foreman of the plaintiff's employers and told him that if the plaintiff were not "stopped" there would be trouble with the men. The defendant had no authority from the executive of the union to do this. The plaintiff, having been dismissed from his employment as the result of the defendant's interference, brought an action against him claiming 50*l.* damages. The jury found that there was not a trade dispute existing or contemplated by the men; that the defendant uttered a threat to the plaintiff's employers with the intention of preventing the plaintiff from getting employment; that this was done to compel the plaintiff to pay the arrear of fine and to punish him for not paying it; that this was not done only to warn the plaintiff's employers that the union men would leave in consequence of their being unwilling to work with the plaintiff, and that it was not done in consequence of their objecting to work with him; and that the defendant did something more than act on behalf of the men employed by the plaintiff's employers. Judgment for the plaintiff for 50*l.* had been given in the county court. On appeal:—

Held, upon these findings, that the act of the defendant was done "in contemplation or furtherance of a trade dispute" within the meaning of s. 3 of the Trade Disputes Act, 1906, and that he was entitled to the protection of that section, and that judgment must be entered for the defendant.

Meaning of "trade dispute" and scope and effect of s. 3 of the Trade Disputes Act, 1906, discussed and explained.

Appeal from the decision of a Divisional Court on an appeal from the judgment of the judge of the Durham County Court, sitting with a jury, which raised the question of the proper interpretation of the words "in contemplation or furtherance of a trade dispute" in s. 3, and "trade dispute" in s. 5, sub-s. 3, of

the Trade Disputes Act, 1906 (1), under the somewhat peculiar circumstances of this case.

The plaintiff was a boiler scaler and a member of a trade union, the National Amalgamated Union of Labour, and was employed by Messrs. Readhead, of South Shields, as a "chargeman." The defendant was a delegate of the National Amalgamated Union of Labour. The action was brought in the county court of Durham, before a judge and jury, to recover damages from the defendant on the alleged ground that he had maliciously by threats and coercive acts procured the dismissal of the plaintiff from the employment in which he was engaged at that time.

The following statement of the result of the evidence in the county court as to the circumstances under which this dismissal took place is taken from the judgment of Kennedy L.J.

Some seven years before the action the plaintiff, whilst a member of No. 173 (South Shields) branch of the National Amalgamated Union of Labour, which he had joined nine years previously, was fined 10*s.* for a breach of the rules of the union. Under rule 18 of the union all fines were to be treated in every way as subscriptions. One Green, the "shop steward" of that branch of the union, informed the plaintiff of the infliction of this fine, but the plaintiff did not pay it, and the union up to October, 1907, took no steps to enforce payment, although for some time after the infliction of the fine the plaintiff remained a member of this branch of the union.

On September 23, 1907, after a two years' interval of non-membership, the plaintiff obtained work with Messrs. Readhead

(1) Sect. 3 provides: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." Sect. 5, sub-s. 3, of the Act provides that "the expression 'trade dispute' means any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises."

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and joined No. 52 branch of the union, the office of this branch being nearer the works than the office of No. 173. When the plaintiff commenced work he had an interview with the defendant, who was the district delegate of the union and was not himself engaged in manual labour. The defendant at that time did not know of the existence of the unpaid fine, and told the plaintiff to go on with his work at Messrs. Readhead's.

On September 29 or 30, the foreman, Joseph Baines, appointed the plaintiff "chargeman" at an increased wage as from October 1. In the meantime some of the plaintiff's fellow-workmen spoke to Thomas Mullin, a member of the union and treasurer of No. 173 branch, about the plaintiff being a financial defaulter to the union, and there was some grumbling among the men about the employment of the plaintiff while the fine was still unpaid; and a workman named Shields stated in his evidence that if the plaintiff went on working he and all the forty-one men employed would come out, that they were all of one mind, and determined not to stay if the plaintiff did.

On September 30, one John Linney, the "shop steward" of this branch of the union, went, at the request of the union men and on their account, to the defendant and told him that unless the plaintiff was "stopped" the men would come out of Messrs. Readhead's works.

On October 1, Thomas Mullin (the treasurer of No. 173 branch) also spoke to the defendant about the plaintiff, stating that he had been deputed by the men to do so, and he then informed the defendant of the outstanding fine. The next day the defendant went to see Joseph Baines, the foreman at Messrs. Readhead's, who had already received a communication from John Linney on the same subject. The defendant said there was trouble about money matters between the plaintiff and the union, and added, "You had better stop Conway (the plaintiff) or there will be trouble with the men." Joseph Baines then sent for the plaintiff and told him what the defendant had said, and advised him to see the defendant and get things put straight. The plaintiff saw the defendant on two occasions and remonstrated with him, but as he declined to pay the fine he had to leave his work, and had since been unable to get work either at Messrs. Readhead's

or at Smith's Dock. Subsequently the plaintiff commenced the present action for 50*l.* damages, alleging (in substance) that the defendant, professing to act on behalf of the union and for the South Shields branch, unlawfully and without authority and maliciously, by threats and other coercive acts directed towards the plaintiff and to his employers, procured the dismissal of the plaintiff and prevented, and continued to prevent, his employment, and, in the alternative, that the defendant, acting as district delegate of the union, but without authority, unlawfully, and for the sole purpose of punishing the plaintiff for non-payment of a fine, molested the plaintiff and, by threats directed to his employers, procured the plaintiff's dismissal from service, and had threatened to prevent, and had in fact prevented, the plaintiff from obtaining service elsewhere, whereby the plaintiff had suffered injury and loss.

The defence to the action was that the defendant had not been guilty of the acts complained of, and, further, that if he had been, the facts shewed that there was a "trade dispute," and the defendant was entitled to the benefit of the Trade Disputes Act, 1906.

At the conclusion of the evidence in the county court the judge submitted ten specific questions to the jury, which, with the answers thereto, were as follows:—

1. Was there a trade dispute existing or contemplated by the men?—No.

2. Did they communicate this fact to Wade?—No.

3. Did Wade act in consequence of such communication?—No.

4. Did Wade utter any threat to any employer of Conway?—Yes.

5. Did what Wade did prevent, or was it intended to prevent, the plaintiff from getting or retaining employment?—Yes.

6. Was it done in order to compel the plaintiff to pay the arrear of fine?—Yes.

7. Was it done in order to punish the plaintiff for not paying such arrear?—Yes.

8. Was what the defendant did done only to warn the employers that the union men would leave in consequence of their being unwilling to work with Conway?—No.

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9. Was it done in consequence of the men objecting to work with the plaintiff?—No.

10. Did he do anything more than act on behalf of the men employed at Readhead's?—Yes.

Upon these findings the county court judge entered judgment for the plaintiff for the amount claimed and refused to accede to the application of the defendant's counsel for a new trial on the ground that the verdict was perverse and against the weight of evidence, and from this refusal the defendant appealed to a Divisional Court.

The Divisional Court (Channell and Sutton JJ.) held that if the jury thought that the whole thing was got up for the purpose of putting this compulsion upon the plaintiff, they were justified in arriving at the conclusion to which they had come; and on the whole the Court did not think that this verdict, which did substantial justice, shewed anything which indicated perverseness on the part of the jury, or was one which a reasonable jury could not have found. For these reasons the Court declined to interfere and the appeal was dismissed. Leave to appeal to the Court of Appeal was, however, granted.

The defendant appealed. The appeal was heard on July 17 and 20.

C. A. Russell, K.C., and *Edward Shortt*, for the defendant. The act here complained of was done in contemplation of a trade dispute which was imminent at the time when the act was done, and it is therefore protected by s. 3 of the Trade Disputes Act, 1906.

[KENNEDY L.J. referred to *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland.* (1)]

The fact that the act was not done under the authority of a trade union is immaterial. Sect. 3 contains no mention of trade unions.

Horace Avory, K.C., and *J. E. Joel*, for the respondent. Non-payment of a fine imposed by a union cannot be a "trade dispute" within s. 3 of the Act of 1906. Some limitation must be put upon the word "person" in this section so as to exclude

(1) [1903] 2 K. B. 600.

a mere busybody from doing mischief and then claiming the benefit of its protection. It is clear from the findings of the jury that what was done was done to compel payment of this fine and punish the plaintiff for not having paid it; that cannot be a "trade dispute." The dismissal was brought about by Mullin and Linney because the fine was unpaid, possibly to satisfy their private ends and in no way in "furtherance of a trade dispute," and the jury have so found. Neither Mullin nor the defendant ever "contemplated" any trade dispute. It is not every dispute between workmen that is a "trade dispute." Some reasonable limitations must be placed on this section.

Shortt, replied.

Cur. adv. vult.

July 30. COZENS-HARDY M.R. This appeal raises questions of difficulty and of general importance as to the meaning and effect of the Trade Disputes Act, 1906, and particularly of s. 3 of that Act. It is plain that the main object of the Act was to put trade unions in a peculiar and preferential position and to treat trade disputes differently from all other disputes. Thus s. 1 alters the law of conspiracy—or rather, I should say, repeals the law of conspiracy—where there is a trade dispute, but leaves it intact in every other case. Sect. 2 sanctions peaceful picketing where there is a trade dispute. Sect. 3 was probably intended as a rider to s. 1. It alters the established common law liability of an individual, apart from conspiracy, not generally, but only where there is a trade dispute either in contemplation or in existence. The language is peculiar. [The Master of the Rolls read s. 3, and continued:—]

It will be observed that this leaves *Lumley* v. *Gye* (1) and *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (2) untouched except as to trade disputes. "Trade dispute" and "workmen" are defined in s. 5, sub-s. 3. [The learned judge read this sub-section, and continued:—] I am unable to limit the generality of s. 3. It cannot fairly be confined to an act done by a party to the dispute. An outsider, a mere busybody, is equally exempt from liability, although he may induce either

(1) (1853) 2 E. & B. 216. (2) [1903] 2 K. B. 600.

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masters or men to break contracts of employment. If there is no existing trade dispute, the act may be justified whether it prevents the contemplated trade dispute from arising or stimulates it. If, however, the trade dispute has arisen, the act must be "in furtherance" of it, and if the act is done by a peacemaker with a view to terminate the dispute, it is not protected. The motive of the act, as distinct from its purposes, seems irrelevant. The words "in contemplation" are difficult, but they must embrace an act done by a person with a view to bringing about a trade dispute. If, for example, a minister of religion says to an employer, "If you do not to-morrow morning discharge all your workmen who are not of my sect, I will call out all my co-religionists," he may act with impunity. A "trade dispute" cannot be limited to a dispute between a body of men on one side and a body of men on the other side. It includes a dispute between an individual on one side and a body of men on the other side. But, strange to say, it does not include a dispute between employers and employers, although it expressly includes a dispute between workmen and workmen.

It remains to apply s. 3 to the facts of the present case. The action was brought in the county court and was tried with a jury. The plaintiff was a member of a trade union, namely, the National Amalgamated Union of Labour. He was employed by Messrs. Readhead, of South Shields, as chargeman. Some seven years ago a fine of 10*s.* was imposed upon the plaintiff by another branch of the union to which he then belonged. This fine has never been paid. The defendant, who was an officer of the union, but who acted without the authority of the executive of the union, threatened the employers that the union men would leave if the plaintiff's employment continued, and this threat was intended to prevent, and did prevent, the plaintiff from getting or retaining employment. This is found by the jury, and there is ample evidence to justify the finding. The jury also found (6.) that this was done in order to compel the plaintiff to pay arrears of fine, and (7.) in order to punish the plaintiff for not paying such arrears. There is ample evidence to justify these findings. But they also found (1.) that

there was not a trade dispute existing or contemplated by the men, and they found for the plaintiff, with 50*l.* damages. The defendant had applied to the county court judge for a nonsuit at the end of the plaintiff's case, but this was refused. After the verdict he applied for a new trial on the ground that the verdict was perverse and against the weight of evidence, but the application was refused. He then appealed to the Divisional Court on the ground that there was no evidence to support the plaintiff's case. This appeal failed, but leave was given to appeal to this Court. With great respect to the learned judges in the Divisional Court, I am unable to agree with their decision. The only question is this: Was there a "trade dispute" either existing or in contemplation? If there was, the action fails, having regard to s. 3. If there was not, the plaintiff can retain his judgment. Now it seems to me impossible to doubt, having regard to the sixth and seventh findings, that there was an existing trade dispute "in furtherance" of which the threats were uttered, namely, a dispute between some members of the union and the plaintiff arising out of the non-payment of the fine. If it was necessary to refer to the plaintiff's own evidence, I think it is abundantly clear that there was such a dispute. Rule 18 of the National Amalgamated Union of Labour's rules treats a fine on the same footing as arrears of contributions. Moreover, I think there is ground for holding that the threat was "in contemplation" of another trade dispute, namely, a dispute between the employers and the union men if the plaintiff continued to work. In my opinion it makes no difference that the defendant had not the authority of the union to call out the men, and that there may have been motives of jealousy prompting the action of the defendant, and that the exaction of the fine was unreasonable after such a lapse of time. These circumstances, whether taken separately or collectively, cannot affect the actual existence of a trade dispute. It follows that in my opinion the appeal must be allowed and judgment entered for the defendant with costs here and below.

FARWELL L.J. This case, in my opinion, depends on the true construction of ss. 3 and 5 of the Trade Disputes Act, 1906.

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We are asked to say that there was no evidence on which the jury could find that there was no trade dispute existing or contemplated by the men, and that the fact of the existence of such a dispute was not communicated to the defendant Wade. The plaintiff who has obtained the verdict is entitled to ask us, as there was a conflict of evidence, to rely on his witnesses and to disregard the defendant's evidence except so far as it is favourable to him.

The facts are simple. For eighteen years the plaintiff has been a member of the Labourers' Union intermittently. Seven years ago he was fined 10*s*., but did not pay, and no action was ever taken against him for such default. In September, 1907, he rejoined the union, and got his card of membership and shewed his receipt to the defendant on September 25, who told him that it was all right, and he could go to work. On October 1 he was given higher wages as chargeman. On October 2 the defendant told Baines, the foreman, that he had better stop the plaintiff or there would be trouble with the men, and he did so. The defendant is a district delegate of the Labourers' Union: he is not a labourer; it was no part of his duty to inflict or collect a fine or to stop any man from working: he had no authority to call out the men without the sanction of the executive, and he had no such sanction. He gave no notice to the plaintiff, nor did he suggest that he should pay the seven-year-old fine. There were two members of the union, Mullin and Green, in the same town; Mullin, having been secretary of the branch to which the plaintiff's fine should have been paid, instigated the defendant to get the plaintiff turned out, and another man, Linney, a shop steward, told the foreman that if the plaintiff kept on the men would stop work. The plaintiff saw the defendant and remonstrated, and asked him if he should stop him wherever he went. The defendant replied, "Certainly I will," and the plaintiff said, "Have I got to starve? What shall I do?"; and the defendant replied, "Do what you like." The jury have found that the defendant by his threats intended to and did prevent the plaintiff from getting or retaining employment in order to compel the plaintiff to pay the 10*s*. and to punish him for non-payment.

Put briefly, the case is this. The defendant, who was not a

workman at all, and had no authority on behalf of any trade union or otherwise so to do, threatened to call out the men at Readhead's in order to compel payment of a fine more than seven years old, of a trifling amount, the payment of which he was not entitled to demand, and the non-payment of which was no business of his, at the invitation of two workmen who objected to the plaintiff. He so threatened with the intention and effect of depriving the plaintiff of all work and chance of work, and contemplated with complacent indifference the result that the man would have to choose between starvation and the workhouse.

The question for our determination is whether such conduct is now legal under the Trade Disputes Act, 1906. It was laid down many years ago in *Heydon's Case* (1), and has been often followed since (2), that, "for the sure and true interpretation of all statutes four things are to be discerned and considered, 1. What was the common law before the making of the Act. 2. What was the mischief and defect for which the common law did not provide. 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. 4. The true reason of the remedy."

Now the Act deals with several distinct subject-matters. Sect. 1 amends the law of conspiracy, s. 2 deals with peaceful picketing, and s. 4 prohibits actions of tort against trade unions; with none of these are we concerned in the present case, which turns wholly on ss. 3 and 5, already read by the Master of the Rolls.

The first question, what was the common law before the Act, presents no difficulty. The struggle for individual freedom began before Magna Charta, and was enunciated by one of its provisions, "no freeman shall be seized or imprisoned or dispossessed or outlawed or in any way brought to ruin," and since Charles II.'s time, when villenage was abolished, every man has been free to dispose of his capital or his labour in any lawful manner that he chose. The freedom of the individual workman to make the best terms that he could for himself was, until 1871, curtailed by the application of the doctrine of public policy which treated combinations of workmen with the object of raising wages as conspiracies

(1) (1584) 3 Rep. 7b.

(2) See *River Wear Commissioners* v. *Adamson*, (1877) 2 App. Cas. 743, at p. 764

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in restraint of trade, but the impediment was removed by the Legislature in that year. This right of freedom to dispose of capital or labour has always been enforced by the Courts, and the liability for its infringement is thus stated in Bacon s Abridgment, tit. Action: "It is clear that for all injuries done to a man's person, reputation, or property, he shall have an action."

Further, it has for centuries been settled that disputes are evils to be discouraged, and that a barrator, i.e., "one who from maliciousness or for sake of gain raises discord between neighbours," is guilty of an offence at common law. "Common barratry is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects." (1) A single offence was not criminal, but frequent offences were; but in point of morality any stirring up of strife without cause or reason is as wicked now as it was when King Solomon declared, "There be six things which the Lord hateth, yea, seven which are an abomination unto him," and one of them was "he that soweth discord among brethren." (2) The King's Courts have been provided for the determination of all disputes with a view to putting a final end to strife, although the parties to a dispute can, in all civil matters, by agreement refer their disputes to arbitration: and under the Trade Union Acts the members of a trade union are bound not to have recourse to the Courts for the settlement of their disputes inter se; but this is a matter for the free choice of the workmen—they are not bound to become members, but if they do they must abide by the terms of membership. Down to 1906, therefore, the freedom of the individual and the settlement of disputes either by action in the King's Court or by a domestic forum agreed upon by the parties were essential parts of our law.

I turn then to the second question, and ask what was the mischief or defect in this state of the law. It is of course common knowledge that the trade unions were dissatisfied with the law of conspiracy and with their position under the judgment in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (3), and desired to obtain for themselves, in addition to that capacity for holding property and acting by agents which

(1) 4 Bl. Com. 133. (2) Prov. vi. 16—19.

(3) [1901] A. C. 426.

they had, the unrestricted capacity for injuring other people by the use of that capacity which they had not, a privilege possessed by no other person or corporation in the realm. But these matters are disposed of by the other sections, and are only material now as shewing that the general nature of the Act is in entire contradiction of those doctrines of personal freedom and equality before the law which have hitherto been its main aim and object.

But s. 3 has no necessary connection with trade unions or their supposed advantages at all, and s. 5 appears to shew that this was intentional, and that the Act was intended to encourage trade disputes whether trade unions were concerned in them or not. And I am confirmed in this by considering the third question, What remedy the Parliament has appointed to cure the disease. I read ss. 3 and 5, so far as applicable to the present case, together, in order to try and ascertain whether any other construction is possible: "An act done by a person in contemplation or furtherance of any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment of any other person, whether in the employment of the employer with whom the dispute arises or not, shall not be actionable on the ground only that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

The first point is that there is nothing to limit the generality of the person doing, or of the person suffering from, the act authorized by the section. The actor may be priest or politician, alien or native born, interested in the trade or business affected, or a mere busybody. All that is requisite is that he should be in a position to induce some workmen to make some complaint, it matters not what, which can be called a dispute between employers and workmen or between workmen and workmen, and to lead the foreman to discharge his enemy for fear of trouble. And this stirring up of strife is the aim and object of this section, for it enacts that the act, in order to be protected, must be "in contemplation or furtherance" of such a dispute; "in contemplation" means "in view of, as a contingency looked for or as

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an end arrived at"; "in furtherance" means "the action of helping forward, aid, assistance."

The next point is, Against whom may this power to do mischief be safely used? Again I can find no limitation in the section. The words "some other person" are perfectly general and include trade unionists as well as all other people; and s. 5 shews that it is not intended to be confined to the workmen of any particular employer. Religion or politics may be the subject-matter of the dispute, and the party injured may have no connection of any sort with the trade or industry in which the dispute has arisen; and trade and industry comprise between them all trades and forms of productive employment. The only limitation that I could find is that an act done in order to put an end to a strike is not protected; the makebate is privileged—the peacemaker is left unprotected.

Counsel urged that the Court ought not to adopt a construction that would lead to such a conclusion, but it is unavoidable. There is no ambiguity about the words, and in such a case the law is well settled, and is thus stated by Lord Campbell, delivering the judgment of himself and eight other judges —*Reg.* v. *Skeen* (1): "Where by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the Legislature, we must enforce it, although in our opinion it may be absurd or michievous. But if the language employed admits of two constructions, and according to one of them the enactment would be absurd and mischievous, and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the Legislature intended." It was possible for the Courts in former years to defend individual liberty against the aggression of kings and barons, because the defence rested on the law which they administered; it is not possible for the Courts to do so when the Legislature alters the laws as to destroy liberty, for they can only administer the law. The Legislature cannot make evil good, but it can make it not actionable.

I can only add that I am unable to answer the fourth of the questions, namely, "the reason for the enactment."

(1) (1859) 28 L. J. (M.C.) 91, at p. 94.

I regret, therefore, that I am unable to agree with the Divisional Court. It appears to me clear on the plaintiff's own evidence that the defendant's act was in contemplation of a dispute both between employers and men, shewn by the threat to call out the men, and also between men and men, connected with the employment of the plaintiff. I regret the conclusion, because I think that it inflicts a cruel hardship on the plaintiff, and it is no consolation to him that far greater hardships will doubtless be inflicted in the future on persons even more innocent than himself—persons who were not guilty even of failure to pay 10*s*. seven years ago. To use Romer L.J.'s language in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1), the conduct of the defendant is morally "an unjustifiable molestation of the man, an improper and inexcusable interference with the man's ordinary rights of citizenship," but those rights have been cut away and the remedy for them destroyed by the Legislature.

KENNEDY L.J. In this action the judgment of the learned county court judge must stand, unless we are satisfied that upon the evidence at the trial, if construed in the manner most favourable to the plaintiff, no case has been made out; or, to say the same thing in other words, unless the findings of the jury which justify a judgment against the defendant can rightly be held to be perverse.

The decision of this appeal hinges almost entirely upon the application of the Trade Disputes Act, 1906, to the particular facts, and, for the purpose of making my judgment plain, I shall first state what I deem to be the meaning and effect of ss. 1, 3, and 5 of that statute so far as they are relevant, and then deal with the evidence adduced at the trial and the findings of the jury.

By the operation of s. 1 all argument previously derivable from the fact of combined action is got rid of, provided that the act is an act done in contemplation or furtherance of a trade dispute. If the act would not be actionable if done by a person acting alone, it is, by virtue of this section, equally not actionable if it is

(1) [1903] 2 K. B. 600, at p. 620.

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the act of two or more persons acting in agreement or combination. So far as concerns a "trade dispute," the law as to the consequences in a civil Court of combined action, as distinguished from individual action, which I understand to be approved in the judgments in *Quinn* v. *Leathem* (1), and previously in judgments in *Mogul Steamship Co.* v. *McGregor* (2) and elsewhere, is swept away by this section.

Sect. 3 supplements s. 1 by enacting that an act done by any person in contemplation or furtherance of a trade dispute shall not be actionable merely because it is an act which either (*a*) induces some other person to break a contract of employment, or (*b*) is an interference with the trade, business, or employment of some other person, or (*c*) is an interference with the right of some other person to dispose of his capital or his labour as he wills. Clearly these last provisions, in all cases of trade disputes within s. 5, alter the law if, prior to this Act of Parliament, the law stood as it was stated to be by Romer L.J. in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (3), and it is needless to consider whether the opinion there put forward by the learned Lord Justice, and elsewhere by some other judicial authorities, before the passing of this Act of Parliament was correct or not. Clearly, also, under these provisions the actor need not himself be a party to the trade dispute, or even a witness.

Sect. 5, sub-s. 3, purports to define the meaning in this Act (and in the Conspiracy and Protection of Property Act, 1875) of the expressions "trade dispute" and "workmen." In the present case there is no suggestion of a dispute as to the terms of the employment or the conditions of labour. The enactment of this section, so far as it is relevant, is that "trade dispute" means any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment of any person. It defines "workmen" as "all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises." It is not, I think, a matter material in the present

(1) [1901] A. C. 495.
(2) (1889) 23 Q. B. D. 598.
(3) [1903] 2 K. B. 600, at pp. 619, 620.

case, but I may note in passing that the drafting of this section in respect of the concluding words, "the employer with whom a trade dispute arises," is at least clumsy, if the definition of "workmen" is intended to apply, as I presume it is, not only in the case of a trade dispute between employer and workmen, but also in the case of a dispute between workmen and workmen, where no dispute with the employer has arisen.

So much for the express terms of the Act of Parliament. They leave to be decided as questions of fact in each particular case whether the "act done" which is referred to in ss. 1 and 3 was or was not done either "in contemplation" or "in furtherance" of a "trade dispute." I shall have to refer to these expressions again in connection with the facts proved in the present case and the findings of the jury; and, for the present, I will only remark that obviously they are wide and comprehensive, and are used to refer, in the first case, to a future and, in the latter, to a pending dispute. [The Lord Justice then stated the facts and, after examining and discussing the findings of the jury and the evidence in support of these findings in some detail, continued:—]

I now approach the real issue in this case. I shall assume that, if the Trade Disputes Act, 1906, did not exist, there are in the findings of the jury, from (4.) to (10.) inclusive, sufficient materials for a justification of the judgment which the plaintiff has obtained. It remains for this Court to consider whether, if the jury has in findings (1.), (2.), and (3.) negatived the existence of facts which would bring ss. 3 and 5 of the statute into operation and thereby would render the act of the defendant of which the plaintiff complains not actionable, there was any evidence to justify those findings.

It appears to me that these three questions themselves are not aptly framed. The second half of the first question is obviously incorrect to the disadvantage of the defendant. The question should have been, not "Was there a trade dispute contemplated by the men?" but "Did the defendant do the act complained of in contemplation of a trade dispute?" Nor are questions (2.) and (3.) satisfactory. Whether the men did or did not make any communication of a trade dispute to Wade, and

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whether Wade did or did not act in consequence of such a communication, it is still conceivably possible that Wade acted, if not in furtherance, still in contemplation, of a trade dispute.

Let it be assumed, however, as I think it ought to be—for counsel who argued the case before us were content so to treat the matter—that by these answers the jury negatived the existence of the facts which under the statute would protect the defendant, namely, that he did the act complained of in contemplation or in furtherance of a trade dispute, i.e., a dispute between employer and workmen, or between workmen and workmen, connected with the employment or non-employment of the plaintiff. Was there in the evidence at the trial anything to justify such a finding?

In my judgment, after anxiously considering the evidence, and without admitting any portion of the evidence of fact which the plaintiff either expressly or inferentially has disputed, it is plain that there was, when Wade went to see Joseph Baines and made use of the words which the jury have found to constitute a threat, and upon which the plaintiff's action is based, a dispute between other workmen and the plaintiff, and that what Wade did was in furtherance of that existing dispute. It is plain from the plaintiff's own evidence that he knew and understood the dispute; and Joseph Baines, the foreman, whom he called as a witness, said in reference to his interview with the plaintiff after he had seen Wade, "I did not actually dismiss Conway; he knew the state of affairs." And, in regard to the object and purpose of Wade's action, the jury have themselves found by their verdict, in answer to questions (6.) and (7.), that Wade did what he did in order to compel the plaintiff to pay the fine in arrear and to punish him for not paying such arrear. I agree with Channell J. that an act done in furtherance of a trade dispute must be held to include at all events an act done in support of one side in such a dispute. I may add that in my view the same evidence also proves that Wade's act was "in contemplation" of a dispute between employer and workmen, inasmuch as if the employer continued, after Wade's communication to Baines, to employ the plaintiff, he obviously had in view (and I presume that "contemplating" means

"having in view") a dispute between the workmen, who had expressed their determination to cease their work at Readhead's if the plaintiff was allowed to continue working without paying the fine incurred by the plaintiff whilst a member of No. 173 branch, and the employer. But it is sufficient to base my decision upon the ground that Wade was acting in furtherance of an existing dispute between the plaintiff and his fellow-workmen.

Before coming to the conclusion which I have stated I have, I need not say, carefully studied, with the great respect due to the learned judge, the judgment of my brother Channell, in which Sutton J., his colleague in the Divisional Court, briefly expressed his concurrence. Channell J. quite frankly says that upon this part of the case he thinks that, so far as he can form a judgment, he should be somewhat inclined to differ from the finding of the county court jury. But he comes to the conclusion that the finding may be allowed to stand, substantially upon the ground, if I appreciate his reasoning correctly, that the jury were at liberty to disbelieve Wade's evidence, and might come to the conclusion (to quote the words of the learned judge as they appear in the transcript of the shorthand note) that "the whole thing was got up for the purpose of putting this compulsion upon the plaintiff." I cannot follow this. Of course the jury were at liberty to disbelieve Wade, but, in regard to the statutory defence under consideration, the case in no way depends upon his evidence. That defence is, in my view, sufficiently established by the evidence of the plaintiff himself and the findings (6.) and (7.) of the jury; if corroboration were needed, it would be found in the evidence of Joseph Baines, called by the plaintiff, and in the evidence of Linney and others, against whom no suggestion, so far as I know, has ever been made. I am afraid I fail to understand what is meant by the suggestion that the "whole thing was got up." It is to me plain, even, as I have said, on the plaintiff's evidence taken alone, that his fellow-workmen, or some of them, had set on foot a very real and very serious dispute—a challenge of the plaintiff's right, whilst in their view a financial defaulter, to be employed with them at Readhead's. The plaintiff recognized its reality and seriousness, as his conduct throughout shewed; so did Joseph Baines, Readhead's foreman;

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so did the foreman at Smith's Dock, when he felt himself compelled, on account of the seriousness of the men's contention, to refuse to give the plaintiff work. It is true that the plaintiff says that he remarked to Wade that the trouble came from Green and Mullin because of their envy of his position of chargeman, "whilst they were walking the streets." The suggestion appears from the evidence to have been, as regards Green at any rate, mistaken, for Green deposes that he had at the time a better job at 5*s.* 6*d.* a day, and Mullin, who was called as a witness, was not cross-examined to shew any such indirect motive for his action. But suppose that out of the fellow-workmen of the plaintiff two or more actively fostered the dispute owing to some indirect or personal motive, that does not affect the reality of the existence of the trade dispute. I am afraid there are many disputes, many serious disputes, in matters other than trade in which some at least of the originators or partisans are actuated by indirect or personal motives, but the disputes will none the less be real disputes on that account.

The true question to be answered, in considering whether the statute applies or not, is whether there was in fact a trade dispute between workmen and workmen, and whether the defendant acted in furtherance of it. The cause of the dispute may possibly seem to us to have been paltry; the motives of some of these workmen who maintained it may have been, in fact, unworthy; the purpose in view may seem to us a harsh purpose. But if, as is my view, the only possible conclusion which can reasonably be drawn from the facts is that there was in the present case, within the meaning of the statute, a "trade dispute," and if the act done by the defendant was within the natural meaning of the very wide language of ss. 1 and 3 done "in furtherance" of that dispute, there was no ground of action established against the defendant, and he is entitled to have the miscarriage of justice which has taken place set right by our judgment allowing this appeal in the way which has been stated by the Master of the Rolls.

Appeal allowed.

Solicitors: *Gibson & Weldon, for Hannay, Hannay & Stewart, South Shields; Edward Clark, Newcastle-upon-Tyne.*

W. C. D.

[IN THE COURT OF APPEAL.]

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Insurance (Life)—Agreement that Statement should be the Basis of the Contract—Effect of Answers to Questions put by Medical Referee of Insurers to Assured—Non-disclosure of material Facts—Absence of Fraud.

One R. M. effected with the defendants an insurance upon her own life in pursuance of a proposal in which she made certain statements, the truth of which was not disputed. She signed a declaration that the statements so made were to the best of her knowledge and belief true, and by which she agreed that "this proposal and declaration" should "be the basis of the contract" between her and the defendants. Subsequently to the proposal, but before the execution of the policy, certain questions contained in a printed form were put to her by a doctor, who was instructed by the defendants to put these questions with any necessary explanation and fill in her answers thereto, and to report upon her health, and these questions were answered by her. Many of these questions related to matters of health, the answers as to which could only be matter of opinion, even if given by a medical expert. Among these questions she was asked to give the names of any medical men consulted by her, and to state when and for what she consulted them; and whether, among other complaints, she had ever suffered from mental derangement. The answer to the last-mentioned question was in the negative, whereas in fact she had, though not aware of the fact, been in confinement for acute mania; and, in the answer to the first-mentioned question, as filled in by the doctor, the name of one Dr. K. M., whom she had consulted for nervous breakdown following influenza, was not mentioned. She signed a second declaration, contained in the before-mentioned form, wherein she declared, "with reference to the proposal for assurance" on her life and her previous declaration, that the answers to the foregoing questions were all true. This declaration did not state that the answers were to form part of the basis of the contract. The policy did not refer to the proposal or either of the declarations. The assured subsequently committed suicide.

An action having been brought on the policy by the executrix of the assured, the defendants resisted the plaintiff's claim upon the ground that the accuracy of the answers to the above-mentioned questions was made a condition precedent to the validity of the policy, and upon the ground of misstatement and non-disclosure of material facts by the assured. The doctor who put the questions to the assured was not called as a witness at the trial. The jury found in answer to the following questions as follows:—Did the assured fraudulently conceal from the defendants that she had consulted Dr. K. M. for nervous

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depression? Answer.—She foolishly, but not fraudulently, concealed this fact. Was the fact that she had consulted Dr. K. M. for nervous breakdown material for the company to know in considering whether they would insure the assured's life? Answer.—Yes. Upon these answers judgment was entered for the defendants:—

Held, on appeal, that, although the terms of the first declaration signed by the assured did not exclude the possibility of the truth of her answers to the questions referred to in the second declaration being material to the validity of the policy, yet, having regard to the nature and purpose of those questions, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract.

Held, further, that under the circumstances of the case, without the evidence of the doctor who put the questions to the assured as to what took place when he put the questions to her, and what explanation of them he gave to her, the second declaration signed by the assured as above mentioned was not per se sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable.

APPEAL from a judgment of the Lord Chief Justice upon further consideration. (1)

The action was brought by the executrix of the will of one Robina Morrison, deceased, against the defendants upon a policy of insurance whereby the testatrix insured her life with the defendants for the sum of 3000*l*.

The defendants set up, by way of defence, that the accuracy of the answers given by the assured to certain questions hereinafter mentioned was made a condition precedent to the validity of the policy; and that the policy was void by reason of fraudulent misstatements and non-disclosure of material facts by the assured at the time when the policy was effected; and, alternatively, by reason of concealment by the assured of the material fact that she had been treated for nervous breakdown by one Dr. Kinsey Morgan.

The insurance was effected in pursuance of a proposal dated October 27, 1902, signed by the deceased, which contained printed questions put to and answered by her with regard to (among other things) the place and date of her birth, whether her life had been proposed to any other office, whether she had been or intended going out of Europe, the nature of her profession or occupation,

(1) Ante, p. 431.

if any, and the names of two friends who knew what her health and habits were. At the end of the proposal form the following printed declaration was signed by her:—"I, the above-named Robina Morrison, do declare that to the best of my knowledge and belief the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the Law Union and Crown Insurance Company. Dated this 27th day of October, 1902. (Signed) R. Morrison."

Subsequently to the proposal, but before the execution of the policy, the defendants sent a printed form to Dr. Bernard Scott, a medical man employed by them to examine the assured, which began as follows:—"Dear Sir,—A proposal for an assurance on the life of Miss Robina Morrison having been made to this company, I am instructed by the directors to submit the case to you, with a request that you will obtain answers from the applicant to the several questions on this and the following page, and make such investigation as to her past and present state of health as will enable you to give the directors your opinion on the third page." The document contained certain questions on pages 1 and 2 headed—"Questions to be put to the applicant (with any necessary explanation) by the medical officer, who will fill in the applicant's answers." Then followed these questions: "(1.) Name (in full); occupation; age next birthday. (2.) Has your life been proposed for assurance to any and to what office or offices? If accepted, was it at the ordinary premium? Has a proposal on your life—(*a*) ever been declined; or (*b*) withdrawn? (3.) Have you always been of sober and temperate habits? (4.) Are you now free from disease or ailment? (5.) What is your height and weight? (6.) State the particulars required in this table as to the several members of your family." (Here followed a table containing particulars required as to father, mother, brothers, and sisters.) "(7.) What medical men have you consulted? When? And what for? (8.) Have any of your relations, living or dead, had any signs of consumption, or been insane, or had fits, or had cancer? (9.) Have you at any time had, and if so, when, any of the following ailments, viz.:—(*a*) Spitting of blood, asthma, palpitation, short breath,

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depression? Answer.—She foolishly, but not fraudulently, concealed this fact. Was the fact that she had consulted Dr. K. M. for nervous breakdown material for the company to know in considering whether they would insure the assured's life? Answer.—Yes. Upon these answers judgment was entered for the defendants:—

Held, on appeal, that, although the terms of the first declaration signed by the assured did not exclude the possibility of the truth of her answers to the questions referred to in the second declaration being material to the validity of the policy, yet, having regard to the nature and purpose of those questions, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract.

Held, further, that under the circumstances of the case, without the evidence of the doctor who put the questions to the assured as to what took place when he put the questions to her, and what explanation of them he gave to her, the second declaration signed by the assured as above mentioned was not per se sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable.

APPEAL from a judgment of the Lord Chief Justice upon further consideration. (1)

The action was brought by the executrix of the will of one Robina Morrison, deceased, against the defendants upon a policy of insurance whereby the testatrix insured her life with the defendants for the sum of 3000*l*.

The defendants set up, by way of defence, that the accuracy of the answers given by the assured to certain questions hereinafter mentioned was made a condition precedent to the validity of the policy; and that the policy was void by reason of fraudulent misstatements and non-disclosure of material facts by the assured at the time when the policy was effected; and, alternatively, by reason of concealment by the assured of the material fact that she had been treated for nervous breakdown by one Dr. Kinsey Morgan.

The insurance was effected in pursuance of a proposal dated October 27, 1902, signed by the deceased, which contained printed questions put to and answered by her with regard to (among other things) the place and date of her birth, whether her life had been proposed to any other office, whether she had been or intended going out of Europe, the nature of her profession or occupation,

(1) Ante, p. 431.

if any, and the names of two friends who knew what her health and habits were. At the end of the proposal form the following printed declaration was signed by her:—"I, the above-named Robina Morrison, do declare that to the best of my knowledge and belief the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the Law Union and Crown Insurance Company. Dated this 27th day of October, 1902. (Signed) R. Morrison."

Subsequently to the proposal, but before the execution of the policy, the defendants sent a printed form to Dr. Bernard Scott, a medical man employed by them to examine the assured, which began as follows:—"Dear Sir,—A proposal for an assurance on the life of Miss Robina Morrison having been made to this company, I am instructed by the directors to submit the case to you, with a request that you will obtain answers from the applicant to the several questions on this and the following page, and make such investigation as to her past and present state of health as will enable you to give the directors your opinion on the third page." The document contained certain questions on pages 1 and 2 headed—"Questions to be put to the applicant (with any necessary explanation) by the medical officer, who will fill in the applicant's answers." Then followed these questions: "(1.) Name (in full); occupation; age next birthday. (2.) Has your life been proposed for assurance to any and to what office or offices? If accepted, was it at the ordinary premium? Has a proposal on your life—(*a*) ever been declined; or (*b*) withdrawn? (3.) Have you always been of sober and temperate habits? (4.) Are you now free from disease or ailment? (5.) What is your height and weight? (6.) State the particulars required in this table as to the several members of your family." (Here followed a table containing particulars required as to father, mother, brothers, and sisters.) "(7.) What medical men have you consulted? When? And what for? (8.) Have any of your relations, living or dead, had any signs of consumption, or been insane, or had fits, or had cancer? (9.) Have you at any time had, and if so, when, any of the following ailments, viz.:—(*a*) Spitting of blood, asthma, palpitation, short breath,

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(4.) "Was the fact that she had consulted Dr. Kinsey Morgan for nervous breakdown in the year 1894 material for the company to know in considering whether they would insure Robina Morrison's life?" Answer.—"Yes."

The case was argued before the Lord Chief Justice on further consideration, when he held that the truth of the answers given by the assured to the above-mentioned questions 7 and 9 (*b*) was not, on the true construction of the documents, made part of the basis of the contract of assurance, but that, there having been non-disclosure of a material fact, the policy was avoided, though that non-disclosure had not been fraudulent; and he accordingly gave judgment for the defendants. (1)

July 23, 24. *Montague Lush*, *K.C.*, and *Hon. S. O. Henn Collins*, for the plaintiff. It was contended for the defendants in the Court below that, upon the correct construction of the documents, the truth of the answers of the assured to the questions referred to by her second declaration was made part of the basis of the contract. But, having regard to the nature of these questions, it is absurd to suppose that it could have been intended that the truth of the answers to them should be warranted, or made a condition of the insurance. The Lord Chief Justice rightly held that this was not the case, and that there was no agreement that this should be so. If an insurance company means to stipulate that the truth of the answers to such questions put to the assured shall be a condition precedent to the validity of the contract, they must do so in such unambiguous terms as a layman can without difficulty understand. Putting the case at the lowest, it cannot be said that the terms of the document here in question are such as would clearly bring home to the assured that they amounted to such a stipulation. The only obligation on the part of the assured was to answer the questions honestly to the best of her knowledge and belief.

Assuming that the accuracy of her answers was not made part of the basis of the contract, the question would still remain

(1) Ante, pp. 437, 438.

whether there was in this case such a misstatement or non-disclosure of a material fact as, in the absence of fraud, would avoid the contract. Contracts of insurance have been held to be contracts in relation to which uberrima fides is requisite on the part of the assured; and, therefore, misstatement, or concealment or non-disclosure of any fact which it was material for the insurers to know, and which was known to the assured, has, no doubt, been held to avoid the contract, although there may have been no fraud on the part of the assured, and he may not have known that the fact so concealed was material. For a considerable time it has been the practice for insurance companies to stipulate in cases of life insurance that the truth of answers made by the person proposing to effect an insurance on his life to questions put to him shall form the basis of the contract. The effect of such a stipulation is, it is submitted, that, inasmuch as it may be doubtful what facts a jury or other tribunal might find to be material, the parties, by convention between themselves, agree that certain matters and no others shall be considered as material, and that the truth of the answers given with regard to them by the assured shall be considered as the condition essential to the validity of the contract. The insurance company thereby obtain the advantage that any matter the truth of which is thus expressed to be the basis of the contract is thereby made material, whether it is really so or not, and whether a jury would or would not find it to be so. It would be a most unfair construction, that being so, if the effect were to leave it open to the company to set up as against the assured that other facts not made the basis of the contract were material: see judgment of Lord Cranworth in *Anderson* v. *Fitzgerald.* (1) The true construction of such a provision is that, so far as concerns the legal obligation in the case of contracts of insurance to disclose or to state truly material facts, the parties mutually bind themselves by convention as to what are to be considered such facts; but that, of course, leaves untouched the obligation to act in good faith, and not to be guilty of any conscious misrepresentation or concealment. The jury in this case have negatived bad faith. Therefore, in the absence of

(1) (1853) 4 H. L. C. 484, at p. 503.

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fraud, the only statements of the assured the truth of which was made a condition, or material to the validity, of the contract were those contained in the proposal form. Assuming that the plaintiff's contention on this point is wrong, the question still remains whether the defendants have really proved that there was any misstatement or non-disclosure of a material fact by the assured. The onus of proof on this question rested upon them. The questions referred to in the assured's second declaration were, on the face of them, not for the information of the defendants, but for the information of Dr. Bernard Scott, for the purpose of enabling him to advise the defendants as to the state of the applicant's health. They were to be put by the doctor to the assured with such explanation as he might think necessary. The defendants did not call Dr. Bernard Scott, and, unless what took place at the interview between him and the assured, and how he put and explained the questions, is known, it is impossible to say whether there was really any misstatement or non-disclosure by the assured. There cannot be concealment by a person of that which he does not know. The assured did not know that she had been mentally deranged. With regard to the non-disclosure of the fact that she had been treated by Dr. Kinsey Morgan for nervous depression, it is impossible, without knowing what took place between Dr. Bernard Scott and the assured when the questions were put, to say whether there was any concealment by the assured. Dr. Bernard Scott was acting for the company, and, when told that the assured had been treated by his brother Dr. T. B. Scott, he may have said that that was enough, and it was unnecessary to give the names of other doctors. It could not have been intended that the applicant should give the names of all the doctors who had ever attended her during her life. The assured had informed Dr. T. B. Scott of her having been treated for nervous breakdown after influenza; therefore, by giving his name as one of the medical men who had attended her, she gave the means of obtaining information as to this to Dr. Bernard Scott as the defendants' agent, and this was sufficient. If Dr. Bernard Scott, as representing the defendants, did not think fit to avail himself of the means of information so given, the defendants must bear the consequences.

Further, it is contended that, having regard to the reference at the commencement of the assured's second declaration to the proposal and her first declaration, which merely stated that to the best of her knowledge and belief the particulars therein stated were true, the true construction of the second declaration is that the answers therein referred to are only true to the best of the assured's knowledge and belief. [They also cited *Hambrough* v. *Mutual Life Insurance Co. of New York* (1); *Jones* v. *Provincial Insurance Co.* (2); *Moens* v. *Heyworth.* (3)]

Montague Shearman, K.C., and *Boydell Houghton*, for the defendants. The agreement in the first declaration signed by the assured that the proposal and that declaration shall form the basis of the contract does not provide that they shall form the sole basis of the contract, or exclude the possibility of the truth of the answers referred to in the assured's second declaration forming part of the basis of, or being material to the validity of, the contract. It is submitted that the words "with reference to the proposal for assurance on my life, and my declaration dated October 30, 1902," in the second declaration shew that the answers mentioned in that declaration were also intended to form the basis of the contract. The assured is asked to answer questions in the proposal form as to certain matters, but only to the best of her knowledge and belief, and the truth of her answers to those questions is made the basis of the contract. It could not, however, be intended that those answers only should form the sole basis of the contract. Questions as to her health are not put directly to her by the defendants, but are, with the necessary explanations, to be put by and answered to the doctor who examines her for the company. She undertakes by her second declaration that the answers given by her to such questions as recorded by him are true, and the intention obviously is that they also shall form the basis of the contract. But, assuming that this is not so, nevertheless, by virtue of the legal doctrines applicable to contracts of insurance, including life insurance, if the answers so given by her are incorrect, and she thereby misstates or conceals

(1) (1895) 72 L. T. 140. (2) (1857) 26 L. J. (C.P.) 272.
(3) (1842) 10 M. & W. 147.

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material facts, the result is that the policy is avoided, even although she did not fraudulently misstate or conceal those facts. In this case there was, as shewn by the findings of the jury, clearly concealment by the assured of the fact that she had consulted Dr. Kinsey Morgan for nervous depression, and the jury found that this was a material fact. Her answers to questions 7 and 9 (*b*) were not true. It may be that she cannot be said to have concealed the fact that she had suffered from mental derangement, because she does not appear to have been aware of that fact; but she knew that she had suffered from influenza and consequent nervous depression, and she did not disclose that, nor that she had consulted Dr. Kinsey Morgan for nervous depression. Apart from questions put, she was bound by the general law governing insurance to disclose the fact that she had suffered from influenza and consequent nervous depression so serious that she had to consult a doctor for it. It may be admitted that question 7 cannot mean that the assured is to give the names of all the doctors she had ever consulted in her life, but this was a case of a doctor being consulted for serious illness, which was a matter plainly material to the question whether, and, if so, at what premium, the insurance should be granted, and therefore one which the assured was bound to disclose. It is clear law that the fact that the assured did not suppose a matter to be material does not relieve him from the obligation to disclose it, if in fact material. It was not necessary for the defendants to call Dr. Bernard Scott. The declaration signed by the assured that the answers to the questions contained in the document were true was sufficient prima facie evidence of the misstatement and non-disclosure relied upon, and it was for the plaintiff to call Dr. Bernard Scott, if she wanted to qualify what was prima facie the result of the document signed by the assured. The declaration that certain matters shall be the basis of the contract cannot, as suggested, mean that nothing else shall be material for the purposes of the doctrine by which the assured is bound to disclose material facts. [They cited *Wood* v. *Dwarris* (1); *Thomson* v. *Weems* (2); *London Assurance* v.

(1) (1856) 11 Ex. 493.
(2) (1884) 9 App. Cas. 671, at p. 684.

Mansel (1); *Lindenau* v. *Desborough* (2); *Brownlie* v. *Campbell* (3); *Dalglish* v. *Jarvie* (4); *Wheelton* v. *Hardisty.* (5)]

Montague Lush, K.C., for the plaintiff, in reply.

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Cur. adv. vult.

July 30. VAUGHAN WILLIAMS L.J. The defendants, the Law Union and Crown Insurance Company, at the trial of this action relied principally upon the defence of fraud, it being alleged that the answers to certain questions put to Robina Morrison on October 31, 1902, were fraudulent and untrue to the knowledge of Robina Morrison, and that the non-disclosure of the true facts was also fraudulent. The jury have negatived all fraud. The questions to which I have referred, and the answers to them, were: "What medical men have you consulted, when, and what for?" Answer.—"Dr. T. B. Scott, Bournemouth; rarely, colds; Dr. Hodson, Brighton; last spring, measles." "Have you at any time had, and, if so, when, any of the following ailments?" and then follows a list that I need not read, but it included "mental derangement." Answer.—"No." The defendants relied alternatively on the non-disclosure by Robina Morrison of the fact, which she knew, that she had been treated, as she believed, for nervous breakdown, by Dr. Kinsey Morgan. This is pleaded without any allegation of fraud, but with the allegation that such facts were material to be known to the defendants and were known to Robina Morrison, but not to the defendants.

The defendants allege that the truth of the answers to the questions of October 31 was a condition precedent to the enforcement of the contract, and the basis of the contract. I think not.

The proposal by Robina Morrison for life assurance contained a declaration of October 27 to the effect that certain particulars appearing on the face of the proposal, in the shape of answers to questions, were, to the best of the knowledge and belief of Robina Morrison, true, and she agreed that the proposal and

(1) (1879) 11 Ch. D. 363.
(2) (1828) 8 B. & C. 586.
(3) (1880) 5 App. Cas. 925, at p. 954.
(4) (1850) 2 Mac. & G. 231, at p. 243.
(5) (1857) 8 E. & B. 232.

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declaration should be the basis of the contract between her and the Law Union and Crown Insurance Company; and the defendants contended that the signature at the end of the answers of October 31, coupled with the declaration "I the said Robina Morrison do hereby declare with reference to the proposal for assurance on my life, and my declaration dated October 30, 1902, that the answers to the foregoing questions are all true," made these answers also the basis of the contract. I cannot agree. If the insurance office meant this, it lay on them to say so plainly. It would have been very easy to have stated plainly that such answers were to be the basis of the contract, but this is not done. With reference to the questions of October 31, it is to be observed (1.) that, unless these questions are expressly made part of the basis of the contract, they appear to be, as the questions on the face of the proposal are in terms stated to be, questions to be answered "to the best of my knowledge and belief"; (2.) that on their face the questions are questions the answers to which no person would warrant. The questions are such as no one but a medical man could answer with an approach to certainty. They are questions to which it would be unreasonable to expect warranted answers. Honest answers were the most any one could expect. Moreover, I do not know what the questions really were. The questions, by the written instructions given to the agent of the defendants, who was to put the questions and fill in the answers, were to be put "with any necessary explanation." I have no doubt he did obey these instructions; but, as Dr. Bernard Scott, the medical officer who obtained and filled in the answers, although in Court at the trial, was not called as a witness, there is no evidence as to what explanations were given to Miss Morrison. Question 7—"What medical men have you consulted?"—in my opinion, involved some necessary explanation. Some limit to this question must have been intended. It could not have been expected that Miss Morrison's answer should extend to early childhood. I do not know what limit was set by Dr. Bernard Scott in his explanation. I do not think that there is anything in law to make the truth of the answers a condition precedent to the liability of the defendants on the policy, and, if the truth of the answer were

not such a condition, it comes within the statement of Willes J. in his judgment in *Wheelton* v. *Hardisty* (1), where he says, "unless it were untrue to the knowledge of the plaintiffs, and therefore fraudulent, the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect. Here is no such stipulation. The mere recital of such a statement in the policy would not alter the general law, or convert such statement from a mere matter of representation into a condition precedent."

Besides these considerations based on the proposal and the two sets of answers, there is another consideration based on the purpose with which Dr. Bernard Scott, the medical agent of the defendants, instructed to put the questions and obtain the signature of Miss Morrison to her answers as written down by him, was so instructed. In my opinion he was so instructed for the purpose of obtaining information to enable him to advise the company as to the class in which he advised that the life of the applicant should be accepted, and he was only to give this advice after he had complied with the following instruction, given in the same form in which the before-mentioned questions were contained :—"The medical officer, having obtained the signature of the applicant at foot of the preceding page, will personally examine her and answer the following questions. It is particularly requested that the results of the examination be not made known to the applicant or agent." "Agent," of course, there does not mean the medical agent, but an agent who it is supposed possibly may present the application of the applicant. These questions and answers were : "Question 1.—What is the condition of the heart? Answer.—Normal. 2. What is the condition of the lungs?—Normal. 3. What is the condition of the viscera in the other cavities?—Normal. 4. What is her general configuration?—Healthy. And physical development?—Good. 5. Has she the appearance of health and vigour?—Yes. And of the age stated (32)?—Yes. And of uniform temperance?—Yes. 6. Has she good marks of vaccination?—Yes. Or has she had smallpox?—The answer to that appears to be 'No.' 7. What is the condition of the urine under ordinary tests?—Both

(1) 8 E. & B. 232, at p. 299.

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evening and morning specimens normal. 8. Is her business or occupation in any way likely to injure her health?—No." There is then this note at the foot: "If there is any special or noteworthy feature in the case not elicited by the printed questions, please to state it here." There is then a statement as follows:—"Miss Morrison is not certain of family history details, but says that exact particulars might be gained from the London and North Lancs. Office, in which her sister, Mrs. F. Gould, was insured." I very much doubt whether the answers of the assured were intended by the defendants themselves to form part of the contract of insurance. The form of the certificate set out in the instructions is as follows:—"Certificate.—I, the undersigned, acting as medical examiner for the company, having regard to the present condition and past health and family history of the applicant, and also to the subjoined table of classified lives, recommend that the applicant be placed in Class I. (If in Class II. state the objectionable features, and the number of years that, in your opinion, ought to be deducted from the average expectation of life (see table on back). The age which the applicant should attain is — years.) Date, October 31, 1902. Signature of medical officer, Bernard Scott, M.R.C.S., &c. Table of classified lives.—Class I.—Good lives, which may be safely assured at the ordinary rate of premium. Class II.—Lives below average, owing to an unfavourable family history or personal condition, or former illnesses, but which may nevertheless be safely assured at an extra rate of premium. Class III.—Bad lives, not desirable for assurance even at an extra rate of premium." This form of certificate certainly points to the purpose of the interview of the medical officer being merely to advise as to the class in which the applicant was to be placed, and not the obtaining of answers which should be the basis of the contract, or even part of the contract.

It is desirable at this point that I should deal with the argument of Mr. Lush, that it was not open to the defendant company to put forward the answers of October 31 as constituting part of the basis of the contract, because the effect of the declaration on the proposal was to limit the material particulars to those appearing on the face of the proposal, and that, that being so,

the obligation of the proposer to make full disclosure of all material facts was limited to the disclosure contained in the answers to questions appearing in the proposal. This argument was based upon the following passage in the judgment of Lord Cranworth in the case of *Anderson* v. *Fitzgerald* (1): "Nothing therefore can be more reasonable than that the parties entering into that contract" (of insurance) "should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that, unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy. Now it appears to me, my Lords, that that is precisely what has been done here. The parties entering into the insurance have so stipulated, 'The basis of our contract shall be your answering truly these two questions.'" Then Lord Cranworth (2) goes on to say: "Thus, if a person effecting a policy of insurance says, 'I warrant such and such things which are here stated,' and that is part of the contract, then whether they are material or not is quite unimportant—the party must adhere to his warranty, whether material or immaterial. But, if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made bona fide, unless it is material, it does not signify whether it is false or not false. Indeed, whether made bona fide or not, if it is not material, the untruth is quite unimportant. . . . . If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover." Now, having regard to the question which was raised in that case, which was simply a question whether, in a case where by the terms of the policy the answers to two questions were made the basis of the contract, it was right for the judge at the trial of an action brought against the insurance office on the policy to ask the jury if such questions and answers were material, as to which the House of Lords decided that it was not right, I cannot see that the observations of

(1) 4 H. L. C. 484, at p. 503. (2) 4 H. L. C. at p. 504.

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Lord Cranworth as to the parties to an insurance contract having a right to determine for themselves what they think to be material, or that the truth of certain answers shall be the basis of the contract, affect the question whether in the contract in the present case the answers to the questions appearing in the proposal are made the whole basis and the only basis of the contract, so as to exclude the answers to the questions of October 31 being also warranties and part of the contract; and still less do I see how these observations on representations and misrepresentations exclude, or tend to shew that we ought to exclude, from this contract the implied contract by an applicant for a policy to make full disclosure of all facts material to the risk.

I have already stated that in my opinion the truth of the answers to the questions of October 31 is not warranted by or made part of the basis of the contract of insurance, and the observations of Lord Cranworth above quoted, in my opinion, strongly confirm my view.

I have now only to deal with the question whether the policy is vitiated by concealment or non-disclosure of facts material to the risks insured against. This to my mind is the most difficult question in this case. First, I ask myself, does the obligation to make full disclosure apply to a contract of life insurance in the same sense that it applies to a contract of marine insurance? In my opinion it does. The judgment of Sir George Jessel in *London Assurance* v. *Mansel* (1) shews that the principles which govern insurance matters, which are said to require the utmost good faith, uberrima fides, apply to all kinds of insurances. But the same judgment shews that there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance. I think also that the insurance office may, by the requisitions for information of a specific sort which it makes of the proposer, relieve him partially from the obligation to disclose by an election to make inquiries as to certain facts material to the risk to be insured against itself. It is worthy of observation that the obligation to disclose does not

(1) 11 Ch. D. 363.

extend to matters equally within the knowledge of those granting the policy of insurance and the applicant for insurance. Thus Lord Campbell in *Wheelton* v. *Hardisty* (1) says: "But the assurer and assured being equally ignorant of material facts to influence their contract, if the assurer asks for information, and the assured does his best to put the assurer in a situation to obtain the information, and to form his own opinion as to whether the information is sincere, can it be permitted, where the assurer, without any blame being imputable to the assured, has allowed himself to be deceived, that he shall be able to say to the assured, 'You warranted all the information I receive to be true; and having received your premiums for many years, now the life drops, I tell you I was incautious, and the policy I gave you is a nullity'? The uberrima fides is to be observed with respect to life insurances as well as marine insurances. The assured is always bound, not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge which it is material for the assurer to know; and any fraud by an agent employed to effect the insurance is the fraud of the principal; but there is no analogy between the statements of the 'life' or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy."

Having said this about the obligation to disclose, I will refer now to the findings of the jury as to the facts within the knowledge of Robina Morrison. The findings were the following:— (1.) "Did the deceased lady Robina Morrison know in October, 1902, that she had suffered from mental derangement?" Answer.—"No." (2.) "Did the deceased lady Robina Morrison fraudulently conceal from the defendants the fact that she had suffered from mental derangement?" Answer.—"No." (3.) "Did she fraudulently conceal from the defendants that she had consulted Dr. Kinsey Morgan in the year 1894 for nervous depression?" Answer.—"She foolishly but not fraudulently concealed this fact." (4.) "Was the fact that she had consulted Dr. Kinsey Morgan for nervous breakdown in the year 1894

(1) 8 E. & B. 232, at pp. 269, 270.

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material for the company to know in considering whether they would insure Robina Morrison's life ?" Answer.—" Yes."

The matters to be disclosed must be matters within the knowledge of the applicant. The only answer causing any trouble is the answer to the third question, which comes to this, that she concealed the fact from the defendants that she consulted Dr. Kinsey Morgan in the year 1894 for nervous depression, and the jury find, in answer 4, that the fact that she had consulted Dr. Kinsey Morgan for nervous breakdown in the year 1894 was material for the company to know in considering whether they would insure Robina Morrison's life. I am not sure what these findings mean. I am inclined to think that they mean that she did not tell Dr. Bernard Scott, the medical officer of the company, or they may mean that she did not inform the ordinary officers and agents of the company, as distinguished from the medical examiner. Whichever be the meaning, I am of opinion that the onus of proving the concealment is on the defendants; and I am not satisfied that Miss Morrison did not tell Dr. Bernard Scott of the nervous breakdown, or that he did not become aware from her statements of the nervous breakdown, and, from information given to him by his brother, both of the nervous breakdown and the attendance of Dr. Kinsey Morgan. At all events, the evidence which was given at the trial appears to me to shew that he was aware of the nervous breakdown which followed the influenza.

Taking everything into consideration, I am inclined to think that the defendants could rely, by way of defence, on the non-disclosure alleged in these respects, if proved; but the question arises whether they have really sustained the onus of proof which rested upon them. I have had grave doubts whether or not the result of what has taken place is not that we ought to order a new trial. The onus of proving non-disclosure or concealment is on the insurance office. The evidence appears to be as follows. In this case the office has proved, first, that the signature of Miss Robina Morrison appears at the end of a declaration at the foot of a page of questions purporting by the printed instructions on the paper to be questions which Dr. Bernard Scott, the medical officer of the insurance company, was instructed to put, after making any necessary explanation, and the answers to which

were to be filled in by the medical officer. Secondly, it appears that Dr. Bernard Scott was in Court at the trial, but the defendants did not call him as a witness. Thirdly, it is proved that Miss Morrison, in answer to the written question as to what medical men she had consulted, when, and what for, answered, "Dr. T. B. Scott, Bournemouth; rarely, for colds; Dr. Hodson, Brighton; last spring, measles." In answer to the written question "Have you at any time had, and, if so, when, any of the following ailments?" among them being mental derangement, she replied "No." We do not, however, know exactly what the questions plus the explanations were. Those answers were followed by the declaration, "I the said Robina Morrison do hereby declare with reference to the proposal for assurance on my life, and my declaration dated October 30, 1902, that the answers to the foregoing questions are all true." Then that is signed with her name. I do not think that by reason of her having so signed her name the onus shifted from the defendant company, on whom the onus lay to prove non-disclosure, to the plaintiff. I say this, amongst other reasons, because one does not know what the explanations were to the questions put. I have already pointed out that question 7 on the face of it involved some necessary explanation, and no evidence was given as to what that explanation was. Fourthly, it is in evidence that the assured was also attended by Dr. Kinsey Morgan, who attended her for insanity following influenza. Dr. Morgan, who was a witness, deposed that he told Miss Morrison that she was suffering from nervous breakdown, and she believed this statement. Now, in addition to what I have already stated, one has to take into consideration some admissions that were made. They appear (1) to be as follows: "It was admitted by the plaintiff that the deceased had in fact suffered from acute mania, and that from January to August, 1895, she had been in confinement in the house of a Dr. Leach; that she had in December, 1894, consulted a Dr. Kinsey Morgan for nervous depression, and that it was upon a certificate signed by him that she had been so placed under restraint." Of course the question with which I am now dealing has not necessarily any relation whatever to the

(1) See ante, p. 432.

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answers to the questions of October 31. It is not a question of representation or misrepresentation. What I am inquiring into here is whether there is any evidence, taking into consideration the evidence in the case generally and the admissions which I have just read, which made it right to leave to the jury questions 3 and 4, as the Lord Chief Justice did. No difficulty arises with regard to questions 1 and 2 and the answers to those questions. Questions 3 and 4 and the answers to them are as follows: (3.) "Did she fraudulently conceal from the defendants that she had consulted Dr. Kinsey Morgan in the year 1894 for nervous depression?" Answer.—"She foolishly but not fraudulently concealed this fact." (4.) "Was the fact that she had consulted Dr. Kinsey Morgan for nervous breakdown in the year 1894 material for the company to know in considering whether they would insure Robina Morrison's life?" Answer.—"Yes." I am of opinion that, apart from the answers signed by Miss Morrison, there was evidence to go to the jury that she knew of the nervous breakdown and the attendance by Dr. Kinsey Morgan, and under the circumstances I should hesitate to say that on these answers, as they stand, the defendants would not be entitled to the verdict and judgment which were actually given; but I think myself there ought nevertheless to be a new trial in this case, because I think that, in the absence of any certainty as to what took place at the interview between Dr. Bernard Scott and Miss Robina Morrison on October 31, it is very doubtful whether she may not have given Dr. Bernard Scott, if not full information, full means of information at this interview. One has to observe that amongst other things she gave information that Dr. T. B. Scott had attended her as her medical attendant. It is true she says for colds, but this put the insurance office in a position in which, if they had chosen to make inquiries of Dr. T. B. Scott, they could have got full information as to all these matters, because it is in evidence that Dr. T. B. Scott himself was fully aware of the influenza and of what followed the influenza. Whether it was what followed at first, the nervous depression, or whether it was what followed later, the mental derangement, it seems to me that that information could have been got, and I have already mentioned the fact

that I am quite in the dark as to what explanations were given when Dr. Bernard Scott put the questions to the lady. I do not think that the jury had it so clearly called to their attention, as, under the circumstances, was requisite, that they could not find for the defendants unless they had sustained the onus of proof that there had been non-disclosure of a material fact; and I am satisfied that the jury treated the answers to the questions as appearing in the printed document as conclusive evidence of such non-disclosure, notwithstanding the fact that Dr. Bernard Scott was not called to prove what took place at the interview when the questions were put, or what explanation of them was given by him to the assured. I think that Dr. Bernard Scott ought to have been called to explain what then took place. I do not think the jury really had these difficulties put before them when the verdict was given, and under those circumstances I have come to the conclusion that the right thing here is to order a new trial. A new trial will be granted on the condition that the charge of fraud is in no way to be reopened.

FLETCHER MOULTON L.J. read the following judgment:—I am of the same opinion. The contract of life insurance is one uberrimæ fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in *Brownlie* v. *Campbell* (1): "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrima fides (2), that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy." There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to

(1) 5 App. Cas. 925, at p. 954. (2) *Sic* in the report.

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tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so.

But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was

what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.

Insurers are thus in the highly favourable position that they are entitled not only to bona fides on the part of the applicant, but also to full disclosure of all knowledge possessed by the applicant that is material to the risk. And in my opinion they would have been wise if they had contented themselves with this. Unfortunately the desire to make themselves doubly secure has made them depart widely from this position by requiring the assured to agree that the accuracy, as well as the bona fides, of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy. This might be reasonable in some matters, such as the age and parentage of the applicant, or information as to his family history, which he must know as facts. Or it might be justifiable to stipulate that these conditions should obtain for a reasonable time—say during two years—during which period the company might verify the accuracy of the statements which by hypothesis have been made bona fide by the applicant. But insurance companies have pushed the practice far beyond these limits, and have made the correctness of statements of matters wholly beyond his knowledge, and which can at best be only statements of opinion or belief, conditions of the validity of the policy. For instance, one of the commonest of such questions is, "Have you any disease?" Not even the most skilled doctor after the most prolonged scientific examination could answer such a question with certainty, and a layman can only give his honest opinion on it. But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly—not merely truthfully—answered, though the insurers are well aware that it is impossible for any one to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in. In the case of the

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question to which I have referred, if it can be shewn, even by the aid of the contemporaneous examination of the medical referee of the office itself, that the insured had at the time some disease, the policy is void. The disease may have been unknown, and even undiscoverable; it may have been transient, and have had no effect on his future life, or on the cause of his death. These things are immaterial. If the company choose to dispute the policy, and establish a single inaccuracy in these statements, which are thus made conditions, the policy is void, and usually all that has been paid thereon is forfeit. Hence I fully agree with the words used by Lord St. Leonards in his opinion in the case of *Anderson* v. *Fitzgerald* (1) to the effect that in this way provisions are introduced into policies of life assurance which, "unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written."

Under these circumstances it is plainly the duty of the Court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy. No ambiguous language suffices for this purpose. The applicant can be and is called on to answer all questions relevant to the matter in hand. But this is merely the fulfilment of a duty—it is not contractual. To make the accuracy of these answers a condition of the contract is a contractual act, and, if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy. In other words, the insurers must prove by clear and express language the animus contrahendi on the part of the applicant; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true. This is only

(1) 4 H. L. C. 484, at p. 507.

what a witness does when he declares he has given true evidence. He is stating his belief, and not making a contract.

In the present case Robina Morrison, the insured, on applying for the policy, filled up a proposal form which required her to state certain particulars regarding herself, and subscribed to a declaration at the foot which was to the effect that she declared that to the best of her knowledge and belief the said particulars were true, and that she agreed that that proposal and declaration should be the basis of the contract. It is not contended that they were not true, so that nothing turns directly on this declaration. She was then sent by the company to a medical man chosen by them to inquire into the case. It happened that her ordinary medical man, Dr. T. B. Scott, was the medical referee usually employed by the company, and therefore they sent her to Dr. Bernard Scott, his brother, for this purpose. They forwarded to him a paper consisting of two parts, the first consisting of questions to be put by the medical referee to the applicant, and the second being a form which, when filled up by the doctor, would constitute his report on the case. The language of both parts requires careful examination, for it is on this paper that the case of the defendants is mainly based. The first part requests the medical referee to obtain answers from the applicant to the several questions contained in the first part of the paper, and to make such an investigation into her past and present state of health as would enable him to give the directors his written opinion on the second part of the paper. The questions are headed as follows: "Questions to be put to the applicant (with any necessary explanation) by the medical officer who will fill in the applicant's answers." The whole of the answers are in the handwriting of the medical officer. At the end of this part of the paper there is a declaration in the following form, signed by the applicant: "I, the said Robina Morrison, do hereby declare with reference to the proposal for assurance on my life, and my declaration dated October 30, 1902, that the answers to the foregoing questions are all true." The second part of the paper commences as follows: "The medical officer, having obtained the signature of the applicant at foot of the preceding page, will personally examine him and answer the following questions.

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It is particularly requested that the results of the examination be not made known to the applicant or agent." Then follow the answers of the medical referee to various questions as to the health and condition of the applicant relating largely to the same matters as the questions which the applicant had been required to answer as described, and ending with a recommendation that the applicant's life should be put in the first class, i.e., of good lives. It is evident that the paper was never intended to pass out of the hands of the medical officer, and, no doubt, never did so. Dr. Bernard Scott was not called by the defendants at the trial, but this paper was put in. The applicant had given Dr. T. B. Scott as her ordinary medical attendant, as he had in fact been for four years, and a report was obtained from him by the defendants which was equally detailed and equally favourable, and the applicant's life was taken as a first class life. She committed suicide in 1906 while of unsound mind.

The defence set up is based on the undoubted facts that the insured in 1894 consulted Dr. Kinsey Morgan for nervous depression, and that subsequently, in 1895, she had on his certificate been in confinement in the house of a Dr. Leach for mental derangement. But the jury have found, and it is not now contested, that she was at the date of the application for the policy unaware that she had suffered from mental derangement. She no doubt knew that she had consulted Dr. Kinsey Morgan, but she thought it was for nervous breakdown following upon influenza, and that he had ordered her a rest cure. The defendants seek to make this adequate to support their defence by contending that the replies given by her to the doctor, and declared by her to be true, came within the class of contractual conditions of validity, and that, as in those answers she stated that she had never suffered from any disease of the brain, the policy never attached. They further say that, even if these answers have not a contractual status, she was asked what medical men she had consulted, and she omitted to give the name of Dr. Kinsey Morgan, who could have informed the company of her serious mental illness in 1895, and that, therefore, the policy is void for non-disclosure of a material fact known to her. The jury have

negatived fraud, and on the circumstances shewn by the evidence I think they were right in so doing; but they have found that she foolishly concealed the fact that she had consulted Dr. Kinsey Morgan, and that this fact was material; and on these latter findings the learned judge in the Court below has given judgment for the defendants.

It is evident, therefore, that the case turns mainly on the status and meaning of the paper signed by her on the occasion of her visit to the doctor. I entertain the strongest opinion that the accuracy of the replies to the doctor who examined her was not a contractual limitation or condition of the contract, but that these replies were, and were intended by both parties to be, only statements made by her to the best of her knowledge for the purpose of assisting the medical referee and the company to judge of the goodness of her life, i.e., of the risk they were taking. In the first place, the occasion and the circumstances of the statement raise a strong probability that this was so. As Lord Blackburn says with regard to a similar case in *Thomson* v. *Weems* (1), "There was very strong ground for saying that it was not shewn that the assured contracted that her answers to a medical man selected by the company, who was to examine her alone and report to them confidentially the conclusion to which he came, were warranted to be accurate; the very object of the examination would be frustrated if the patient was not to answer frankly and without reserve to the questions she was asked." Next, the nature of the questions shews that they must have been regarded as between the interlocutor and the answerer as relating to belief only. I will not again refer to the question as to whether she was free from disease or ailment, a matter of which he was infinitely better able to judge than was she, and which it was the very object of the interview for him to investigate by tests. But take such a question as this: "Have you had a rupture, and, if so, is it reducible, and is an efficient truss worn?" She was not able to decide on the reducibility of the rupture or the efficiency of a truss, and he was. Moreover, the very letter to the doctor shews that the questions formed part of an investigation to enable him to make a confidential report on

(1) 9 App. Cas. 671, at p. 683.

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the facts of the case. Considering the position of the parties at the interview, and the duty on her part, which she must have felt, and he must have relied on, to answer fully whatever questions he put, so as to help him most, it would require the strongest possible language in the declaration to make me believe that she had intentionally altered her position from that of one who was bound to help the doctor acting for the insurers to the utmost of her power to that of a contracting party entitled like every other contracting party to view their demands with suspicion and, so to speak, to hold them at arm's length in defence of her interests. There is no such language to be found in the declaration, which merely goes to the truth of the statements, and in my opinion adds little, if anything, to what the law would have implied from the fact of the statements being made. It is a case in which the principle of taking such a document as this "contra proferentes" ought to be applied in the strongest way, in view of the confidential character of the interview and the relations created thereby. If such a contractual effect is to be given to what passes at a medical examination, then in my opinion a man ought to take his lawyer with him when he goes to be examined, and I say further that in my opinion the members of the medical profession ought to refuse to act for offices that put such an interpretation on what there passes. The duty of a medical practitioner at such a time is to work with and by the aid of the applicant in order to enable himself to give a reliable report to the office, and not to negotiate onerous contracts woven out of the well-meant efforts of the person he is examining to assist him in his task. There is something which to my mind is repulsive in the idea of a medical man under such circumstances inducing—as he is entitled and bound to do—the applicant to tell him freely all that he knows about himself, with the intention of making every such statement go to increase his contractual obligations, and to render the terms of the policy more onerous, and thus to give fresh chances to the company of disputing and perhaps invalidating the policy years afterwards when the man has passed away, no doubt in the confidence that the premiums he has paid through all the subsequent years of his life have secured a provision for his family.

But I have now to consider the effect of the statements as statements by the applicant to the proposed insurers, and therefore statements which were bound to be full and truthful. From this point of view only one matter is relied upon by the defence, namely, the omission of all reference to her having been treated by Dr. Kinsey Morgan. But in this connection we have to look carefully at the genesis of the document. The paper was not sent direct to the applicant, but to the doctor, who was directed to put the questions to the applicant, "with any necessary explanation," and to fill up the paper himself. He was not called at the trial. Now I have no doubt that he performed his task with the utmost bona fides and with perfect loyalty to both the applicant and the company. But this direction entitled him to put such construction upon the several questions as he thought reasonable, and authoritatively to state to the applicant that such was their meaning, and that she might and should answer them on that understanding. It is evident from the nature of the questions themselves that some explanations and limitations of this kind must have been given. Take question 8: "Have any of your relations, living or dead, had any signs of consumption, or been insane, or had fits, or had cancer?" The answer is "No." This, interpreted strictly, would mean that countless persons, many of whom could never have been known to the answerer, as, for instance, her great-grandparents, were included in the answer. I have no doubt that the medical officer explained within what reasonable limits this was to be taken, and also gave some explanation of what "signs of consumption" would mean; and I can see from his note in his report that, although he put down the answer "No" and allowed her to sign the paper, he was aware that she had expressed the slightness of her knowledge of the matter and had referred him to her sister for better information. Similarly with the question on which the defendants rely. I have no doubt that neither the medical officer nor the applicant intended that a list of all the doctors she had seen in her life should be given in answer to that question, or supposed that the list there given was or was meant to be complete. It was intended to be sufficient for practical purposes, and, so far as I

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can see, the answer was truthful and proper to the question as it probably was explained. In my opinion this paper, taken by itself, furnishes no evidence even of non-disclosure sufficient to support the onus which lay on the defendants. The applicant was justified in saying that the answers were true, if they were so in the sense in which the questions were explained to her by the agent of the company, who had their specific authority to give explanations, and, as they did not call him, they cannot rely on the strict language of the question, or on the construction which would be given to the document by a Court interpreting a document prepared and signed by the applicant alone or under different circumstances. And, even if Dr. Bernard Scott had been called, I should be—were I a juryman—slow to suppose that there had been non-disclosure by the applicant by reason of her answer to this question, seeing that a misunderstanding might so easily arise on the point. Once realize that in all probability neither party thought that an exhaustive list was required or intended, and the document is rendered practically worthless for the purposes of the defence.

I am therefore of opinion that the paper signed by the applicant before the doctor does not support the case of the defendants. Taken by itself, without any evidence of the explanations given by the medical referee in putting the questions, it does not to my mind afford any evidence of non-disclosure of the fact of the applicant having been attended by Dr. Kinsey Morgan, still less does it shew that the applicant answered untruthfully the questions put to her on behalf of the company as explained to her by the examining doctor. There is nothing in the paper which leads me to think that she acted at that interview otherwise than as an honest person, genuinely desirous to perform her duty to the company, might reasonably have been expected to do. I therefore put this declaration aside as insufficient to support the defence.

But I now come to the point which has occasioned me the greatest difficulty. Over and above the two documents signed by the applicant, and in my opinion unaffected by them, there remained the common law obligation of disclosure of all knowledge possessed by the applicant material to the risk about

to be undertaken by the company, such materiality being a matter to be judged of by the jury and not by the Court. Here the jury have found that the applicant foolishly but not fraudulently concealed from the defendants that she had consulted Dr. Kinsey Morgan in the year 1894 for nervous depression, and that the fact that she had so consulted him was material for the company to know in considering whether they would insure her life. I have no hesitation in coming to the conclusion that we cannot act upon these findings so as to support the judgment for the defendants, because the declaration signed by her was allowed to go to the jury as, and taken by the judge to be, a concealment of the fact which made her liable as for non-disclosure. For the reasons I have given I am of opinion that no such case can be based on that declaration. But I cannot say that, taking the whole of the evidence together, the jury might not have come to the conclusion that in fact there was non-disclosure of the knowledge that she had in this respect, and that she ought to have realized that such knowledge was material. The fact that her own doctor—the ordinary medical referee of the company—seems to have been fully aware of as much as she herself knew about her having consulted Dr. Kinsey Morgan, and shews by his report that he attached no importance to it, makes me wonder that the jury should have returned the finding that they did to the fourth question, and makes me believe that they meant by it to say, not that she had any knowledge that a reasonable person would have considered material to impart to the company, but that the fact, if imparted and followed up by them, would have led to the discovery of matters unknown to her which would have been material. This does not, in my opinion, suffice to support a defence of non-disclosure. But the findings exist, and, though for the above reasons I am of opinion that the judgment for the defendants must be set aside, I cannot say that even with proper directions there may not be evidence for the jury to consider on these issues, and I therefore am of opinion that the case ought to be sent down for a new trial.

BUCKLEY L.J. The document dated October 27, 1902, provides that the proposal and declaration shall be the basis of the

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contract. I do not assent to Mr. Lush's argument that it results from this that nothing else was to be the basis of the contract, and I cannot find in Lord Cranworth's judgment in *Anderson* v. *Fitzgerald* (1) anything to support the contention that it does. The question is one of construction. It does not follow, because contractually two facts are to be the basis of the contract, that no other facts are to be added to, or are to form part of, the basis.

But, secondly, I am of opinion that the facts stated in the document of October 31, 1902, are not contractually added to the facts which are to be the basis of the contract. It is plain from the latter document that it is one addressed to a medical man, who may be employed for the first and last time to report on the particular case, and to whom a fee of one guinea is offered for his services. It shews that he is instructed to put certain questions to the applicant "with any necessary explanation," that is, explanation which seems to him necessary, and he is to fill in the applicant's answers to the questions thus put. With the assistance of the answers, he is to make such an investigation as to health as will enable him to give the opinion on the third page. The portion of the document signed by the applicant amounts, I think, only to this, that the applicant says "I know that I have proposed to insure with the office; I know that I have made the declaration contained in the first document; and, seeing that you have come to examine me medically on behalf of the office, I declare that I have given true answers to the questions you have put to me." The operative part of the document commences on page 3, and its purpose appears by the certificate with which it terminates. That purpose is to say in what class the applicant shall be placed. There is in all this nothing which makes the applicant's answers in this document the basis of the contract.

The questions appearing in the second document were in my judgment asked and answered, not for the purpose of informing the office as to the applicant's health, but for the purpose of assisting Dr. Bernard Scott in advising the office as to her health. Many of them were questions which the applicant could not possibly answer as matter of fact, and which, indeed, no medical

(1) 4 H. L. C. 484, at p. 503.

man could answer as matter of fact. They were questions of opinion. The purpose, moreover, of the answer was, not that the office was to rely on the answer, but that the medical man with the assistance of the answer was to make a medical examination and advise the office on the question of fact, or rather I should say the question of opinion, as to health.

Thirdly, the answers as appearing in the document are not, I think, as against the applicant sufficient evidence to shew what disclosure she made, or what, if any, concealment she practised, without calling Dr. Bernard Scott to say what explanation, if any, he gave as to the manner in which he wanted the questions answered, and what replies she gave to the questions or modified questions which he put to her. The answer is filled in by him as representing what she told him, and in answer to a question whose form the document alone does not disclose. The document is, no doubt, evidence in the sense that it is admissible, but it is not, I think, evidence of the facts for which the defendants seek to use it. It does not necessarily disclose the question put. It does not necessarily disclose the answer given. Indeed I go further and say that it does not purport to shew the answer given. All that it shews is that the assured accepted as correct the doctor's version of the effect or substance or outcome of the answer she verbally gave to the question, whatever it was, that he put. Take the concrete case, the disclosure of Dr. Kinsey Morgan's name. The defendants say that it is not in this document and that it ought to have been there, and that that is evidence that the name was not disclosed. In my opinion it is not. The defendants' proposition rests upon the basis that the name ought to have been there and is not there, and therefore presumably was withheld. How do I know that it ought to have been there? That depends upon the form in which Dr. Bernard Scott in fact put question 7.

Thus far, therefore, my opinion is that the answers in the second document did not constitute any warranty or form any part of the basis of the contract, and, further, were not, without calling Dr. Bernard Scott, sufficient evidence as against the applicant upon the question of disclosure or concealment.

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But, fourthly, it remains that the assured had, as she knew, suffered a serious illness, namely, influenza followed by serious consequences, although she did not know that in fact it had resulted in mental derangement. The plaintiff does not prove that the assured disclosed the fact that she had had a serious illness. Here the question divides itself into two parts. First:—Was she at her interview with Dr. Bernard Scott asked whether she had suffered from a serious illness? It is possible, I think, to read the seventh question as if (transposing it) it had been "What illnesses" (that is, serious illnesses) "have you had, and whom did you consult upon them?" But in the absence of Dr. Bernard Scott it is impossible, I think, as against the assured, to assume that the question was put in that form. The facts are much more consistent with the probability that he put the question, more or less, as it stands, and was satisfied so soon as he was told the names of two medical men, one of whom was his own brother, and that thereupon he may have said that that was enough and he wanted no more. Secondly, however—whether she was asked or not—the question remains whether, upon the general law, she was bound (unless by contract she had been relieved from so doing) to disclose the material fact that she had had a serious illness. In my opinion she had not been contractually relieved from that duty under the general law. But then the matter stands thus. It was for the defendants to prove that she did not disclose that illness. The mere production of the second document did not, I think, cause the onus to shift so as to throw it upon the plaintiff to prove that she did disclose it, for the document is no prima facie evidence that she did not disclose it. Whether she did or not depends upon what passed between her and Dr. Bernard Scott. Here it is material to state that Dr. T. B. Scott, whose name she did give, was a person who, as has been proved, knew from her information that she had had a nervous breakdown for which she had to undergo a rest cure, and that she and her mother dreaded a recurrence. Inasmuch as she did not know that it had resulted in mental derangement, Dr. T. B. Scott would not, of course, have learned that fact from her; but he knew of the serious illness, and she had, by giving

Dr. T. B. Scott's name, referred Dr. Bernard Scott to a person who was able to give him information to the extent to which the assured had given Dr. T. B. Scott information. Under these circumstances it seems to me that the onus remained upon the defendants, and that there was some evidence that she had made disclosure, inasmuch as she had referred Dr. Bernard Scott to Dr. T. B. Scott, who was in possession of all the information which she had, although that information, I agree, was not exhaustive. So far I should be of opinion that the defendants have not discharged the onus of proving that there was non-disclosure.

Fifthly, that which the defendants have principally advanced is that the assured did not give the name of Dr. Kinsey Morgan. It is necessary here to discriminate. The material fact here was not the person of the medical man who attended her, but the fact that she had suffered from a certain illness. She did not know of the mental derangement, and, therefore, did not, of course, conceal that. The withholding of Dr. Morgan's name was not withholding a material fact, but withholding the means of enabling the office to ascertain a material fact. Whether she withheld the name or not depends, as I have said, upon the manner in which Dr. Bernard Scott put question 7 to her. The defendants have not proved how that question was put.

There remains, however, the third finding of the jury. This, I may say, is that which has given me the most trouble. To my mind the question put to the jury is embarrassing, and the answer most unsatisfactory. The question, reading it in bits, is this: "Did she fraudulently conceal from the defendants" something? The whole point of the question lay, I think, in the word "fraudulently." The jury answered that she did not fraudulently conceal; that, I think, was the substance of their answer. They were not asked the question, Did she conceal? But they have answered that question. And to that they have appended an adverb, and have said that she "foolishly" concealed something, a matter which they had not been asked. However, it does not stop there; the thing as to which the question as to concealment is asked is not a simple but a complex fact. The question runs thus: "Did she fraudulently

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conceal from the defendants that she had consulted Dr. Kinsey Morgan in the year 1894 for nervous depression?" It does not ask, Did she conceal that she had suffered from nervous depression?—which would be one question; nor, Did she conceal that she had consulted Dr. Kinsey Morgan?—which would be another and a different question; but asks, Did she conceal that she had consulted Dr. Kinsey Morgan for nervous depression?—which is a third and a complex question. When the jury answered, inserting the word "foolishly," that she foolishly concealed something, whether they meant that she foolishly concealed the name of the doctor, or whether they meant that she foolishly concealed the complaint, or whether they meant that she foolishly concealed that she consulted a certain doctor for a certain complaint, I do not know. It seems to me that the question was embarrassing, and the answer leaves me in the greatest doubt. However, there is that finding of the jury. The defendants say that the judgment, which was in their favour, was right, because the findings of the jury led to that conclusion. I do not think myself that they can successfully say that. The extraordinary position seems to me to be this, that we have here a plaintiff appellant who asks, not for a new trial, but for judgment in her favour, and defendants who have succeeded below, and yet contend that they ought to be allowed a new trial. It really comes to this, as it appears to me, that the defendants who have failed, and have failed from the way in which they conducted their case, are to have an opportunity of seeing whether they cannot do better. Had I been without the assistance of my learned colleagues, while admitting that the trial has been so unsatisfactory that I should have felt the greatest temptation to say that justice required that there should be a new trial, I hope I should have been strong enough to say that that temptation ought to be resisted, because in my view the defendants have not succeeded in proving that which rested upon them, and must take the consequences. At the same time, having regard to this question and to this finding, as to the exact meaning of which I really am left in the utmost doubt, and the admitted fact that the lady did know that she had had a serious illness—

having regard to all those facts, I quite agree that it is far more satisfactory that there should be a new trial.

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New trial ordered.

Solicitors for plaintiff: *F. Richardson & Sadlers, for Clayton & Gibson, Newcastle.*

Solicitors for defendants: *Robins, Hay, Waters & Hay.*

E. L.

[IN THE COURT OF APPEAL.]

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WOODHAM SMITH *v.* EDWARDS.

Practice—Judgment Debt—Order for Payment by Instalments—Execution—Necessity for Leave—Execution Act, 1844 (7 & 8 *Vict. c.* 96), *s.* 61—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Rules of Supreme Court, Order* XLII., *r.* 24.

Where judgment has been recovered in the High Court for a sum of money, and an order has been made by the judge in bankruptcy under s. 5 of the Debtors Act, 1869, for payment of the judgment debt by instalments, execution may issue under Order XLII., r. 24, of the Rules of the Supreme Court for the amount of instalments which have become due and are unpaid.

Semble, the power to order the issue of execution as provided by s. 61 of the Execution Act, 1844, can be exercised by any judge of the High Court and is not confined to the judge in bankruptcy.

APPEAL from Ridley J. at chambers.

On December 21, 1905, the plaintiff recovered judgment against the defendant in the King's Bench Division for 209*l.* 0*s.* 3*d.* and 8*l.* costs. On March 23, 1907, the judgment being unsatisfied, on the application of the plaintiff an order was made by the judge in bankruptcy, under s. 5 of the Debtors Act, 1869, that the defendant should pay the amount due under the judgment by instalments of 4*l.* a month, the first payment to be made on April 23, 1907, and a similar payment on the 23rd of each month thereafter. On May 5, 1908, the defendant Edwards recovered judgment for 156*l.* in an action brought by him in the King's Bench Division against Haslam & Co., in which the defendants

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had paid 75*l.* into Court with a denial of liability. At that time there was due under the judgment obtained by the plaintiff Woodham Smith against the defendant Edwards the sum of 216*l.* 14*s.* 1*d.*, being the balance of the judgment debt and interest, and the defendant was in default in the payment of eight of the monthly instalments, and on May 5, 1908, on the application of the plaintiff Woodham Smith, a charging order nisi was made in respect of the 75*l.* in Court in the action of *Edwards* v. *Haslam & Co.* On May 18 Ridley J. at chambers made an order discharging the charging order nisi, on the ground that the order for the payment of the judgment debt by instalments was a bar to the issue of execution for the balance of the judgment debt and interest. The plaintiff appealed.

The plaintiff had also obtained a garnishee order nisi for 81*l.*, the balance of the judgment for 156*l.* which the defendant Edwards had recovered against Haslam & Co., which balance Haslam & Co. had paid into Court. On the application to make the garnishee order absolute Ridley J. reconsidered the decision given by him with regard to the charging order, and made the garnishee order absolute. From this decision the defendant appealed. The two appeals were heard together.

C. Lacey Smith, for the plaintiff. Where an order has been made by the judge in bankruptcy under s. 5 of the Debtors Act, 1869, for the payment of a judgment debt by instalments, and the judgment debtor makes default in payment of an instalment, the judgment creditor is entitled to issue execution for the whole amount of the judgment debt remaining unpaid, if the Court at the time of making the order for payment by instalments, or subsequently, has imposed no restriction as to the amount for which execution is to be issued: Execution Act, 1844 (7 & 8 Vict. c. 96), s. 61 (1); County Courts Act, 1888, s. 149; County

(1) Execution Act, 1844 (7 & 8 Vict. c. 96), s. 61: "If the judge of any . . . . Superior Court shall have made any order for the payment of any sum of money by instalments, execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for each successive instalment and costs remaining

Court Rules, 1903, Order XXV., r. 8; Bankruptcy Rules, 1886 to 1890, r. 361. No restriction was ever imposed in this case as to the amount for which execution might issue if default were made, and therefore the plaintiff is entitled to issue execution for the full amount of the judgment debt remaining unpaid. Ridley J., in discharging the charging order nisi, acted on *Montgomery* v. *De Bulmes* (1) and *Jones* v. *Jenner*. (2) Both those cases are distinguishable. In the former the judgment debtor had not made default in paying the instalments of the judgment debt, and, further, the order in both cases for payment by instalments having been made in the county court, the judgment creditor was seeking to issue execution in the High Court, and it was held that if a plaintiff elects to enforce his judgment in an inferior Court he cannot afterwards issue execution in the High Court. On the other hand, there is a dictum of Cave J. in *In re Ives, Ex parte Addington* (3) to the effect that an order to pay by instalments does not take away the right to levy execution. It is true that that dictum was dissented from by the Court of Appeal in *Montgomery* v. *De Bulmes* (1), but in so doing the Court of Appeal failed to observe the distinction that arises where the judgment debtor has made default in the payment of the instalments. A charging order is a form of execution, and, the defendant having failed to pay the instalments as they became due, the charging order ought to be made absolute, and the judge at chambers acted rightly in making the garnishee order absolute. [He also referred to *In re a Debtor, Ex parte Rock Red Brick Co.* (4); *In re Watson.* (5)]

Hugh Sturges, for the defendant. The question whether an order for payment of a judgment debt by instalments operates as a stay of execution must be considered with reference to s. 61 of the Execution Act, 1844, which has never been repealed. That section provides that if there has been an order for payment of money by instalments, execution upon such order shall

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from time to time unpaid, as the judge shall order either at the time of making the original order or at any subsequent time under the seal of the Court."

(1) [1898] 2 Q. B. 420.
(2) (1856) 25 L. J. (Ex.) 319.
(3) (1886) 16 Q. B. D. 665, at p. 670.
(4) (1904) 90 L. T. 64.
(5) [1893] 1 Q. B. 21.

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not issue until after default in payment of some instalment, and then execution may issue either for the whole amount remaining due or for each successive instalment "as the judge shall order either at the time of making the original order or at any subsequent time." Therefore, under that section it is clear that, where there has been an order for payment by instalments, two conditions must be satisfied before execution can issue. First, there must be an instalment in arrear; and, secondly, there must be an order of the judge who made the original order specifying whether the execution should be for the whole amount of the debt or only for the instalment. In other words, there is a stay of execution unless the leave of the judge to issue execution has been obtained. Then by s. 5 of the Debtors Act, 1869, power is given to order payment of a judgment debt by instalments as an alternative to committal, but if an order for payment by instalments is made under that section, it is subject to the provisions of s. 61 of the Act of 1844 as to leave being required for the issue of execution. Under s. 103 of the Bankruptcy Act, 1883, the jurisdiction and powers which under s. 5 of the Debtors Act, 1869, were vested in the High Court are now vested in the judge in bankruptcy, and it follows that if the judge in bankruptcy makes an order under s. 5 of the Debtors Act, 1869, for payment of a judgment debt by instalments, he, and he only, is "the judge" who under s. 61 of the Execution Act, 1844, has to order that execution may issue either for the full amount of the debt or for the instalments in arrear. In the present case no such order has ever been made by the judge in bankruptcy, and, therefore, the plaintiff is not entitled to issue execution either for the balance of the judgment debt or for the eight instalments which are in arrear. Chitty L.J. in *Montgomery* v. *De Bulmes* (1) stated in terms that, so long as an order for the payment of a judgment debt by instalments stands, the plaintiff is not entitled to issue execution. The proper course for the plaintiff to follow was to apply to the judge in bankruptcy for an order varying the original order for payment by instalments by giving leave to issue execution for such amount as the judge thought fit.

(1) [1898] 2 Q. B. 420.

C. Lacey Smith, in reply. With regard to the instalments which have become due and are unpaid, there is clearly power under Order XLII., r. 24, of the Rules of the Supreme Court (1) to issue execution without leave, for the order to pay the instalments, though made by the judge in bankruptcy, is an order of a judge within that rule, and may therefore be enforced in the same manner as a judgment.

[FLETCHER MOULTON L.J. Are you content to have execution for the amount only of the instalments in arrear ?]

Yes.

FLETCHER MOULTON L.J. I am of opinion that the plaintiff's appeal must be allowed and that the charging order should be made absolute, and that the defendant's appeal must be dismissed, but both the charging order and the garnishee order must be limited to the amount of the instalments of the judgment debt which have become due and are unpaid. A short and easy method of arriving at that conclusion is to be found in Order XLII., r. 24, of the Rules of the Supreme Court, which provides that "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." I am satisfied that an order to pay a judgment debt by instalments is equivalent to an order to pay each instalment at the specified date, and consequently when an instalment has become due and is not paid Order XLII., r. 24, authorizes execution to be issued in respect of that instalment, and therefore, as a charging order and a garnishee order are forms of execution, the plaintiff is entitled to have both these orders made absolute in respect of the instalments which are in arrear.

But a somewhat tangled argument has arisen on the question whether it was in the power of the judge at chambers to make the charging order absolute in respect of the whole amount of the judgment debt, it being contended that execution could not issue

(1) Rules of the Supreme Court, Order XLII., r. 24: "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

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without the leave of the judge in bankruptcy; and though it is not now necessary to decide that question—and I do not wish to decide anything that we are not obliged to—I think we ought to express our opinion on the point. The power to order the committal of a judgment debtor for non-payment of a judgment debt under s. 5 of the Debtors Act, 1869, is now by s. 103 of the Bankruptcy Act, 1883, and the Bankruptcy Rules vested solely in the judge of the Bankruptcy Court; and, ancillary to that power, he has power to order the payment of a judgment debt by instalments. Under s. 61 of 7 & 8 Vict. c. 96 there is also power to order that a judgment debt shall be paid by instalments, and s. 61 goes on to say that "execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for each successive instalment and costs remaining from time to time unpaid as the judge shall order either at the time of making the original order or at any subsequent time under the seal of the Court." So far as I have been able to ascertain, that is the only restriction upon the issue of execution upon a judgment debt in the High Court when there has been an order for payment by instalments and default has been made in the instalments. It has been contended by counsel for the defendant that the effect of s. 61 is that in the circumstances of this case execution cannot be issued without the leave of the judge in bankruptcy, who is the judge who ordered the payment of the judgment debt by instalments; but I think the answer to that argument is that the jurisdiction transferred to the judge in bankruptcy by s. 103 of the Bankruptcy Act, 1883, is the jurisdiction under s. 5 of the Debtors Act, 1869, and not the jurisdiction under s. 61 of 7 & 8 Vict. c. 96, and that the words in s. 61, "the judge shall order," include any judge of the High Court. The judge at chambers is therefore within those words, and would have power to order execution to issue. It follows that, whether this case be dealt with as within Order XLII., r. 24, or within s. 61 of 7 & 8 Vict. c. 96, Ridley J. had power to order execution to issue for the instalments in arrear.

The plaintiff's appeal will therefore be allowed and the defendant's appeal dismissed, but without prejudice to the solicitor's lien for unpaid costs.

BUCKLEY L.J. On December 21, 1905, the plaintiff Smith obtained judgment against the defendant Edwards for 217*l.* 0*s.* 3*d.* The judgment debt was not paid and a committal summons was taken out by the plaintiff, and on March 23, 1907, Bigham J., sitting as judge in bankruptcy, made an order for the payment of the judgment debt by instalments of 4*l.* a month, the first instalment to be paid on April 23, 1907. In May, 1908, the defendant was in default as to eight monthly instalments, and the plaintiff obtained a charging order nisi upon a sum of 75*l.* which had been paid into Court in an action in which the defendant Edwards was plaintiff. Ridley J. at chambers discharged the charging order nisi, and the plaintiff has appealed from his decision.

The order for the payment of the judgment debt by instalments was made under s. 5 of the Debtors Act, 1869, and the result of that order having been made was that there was no longer a present debt of 217*l.* 0*s.* 3*d.* due from the defendant, but a debt accruing due by 4*l.* a month. So far as the Debtors Act, 1869, is concerned there is nothing to prevent the issue of execution on the instalments as they fall due; each instalment, if unpaid, is a debt on which execution can issue.

But the defendant relies on s. 61 of 7 & 8 Vict. c. 96 in support of his contention that execution cannot issue without the leave of the judge in bankruptcy, who made the order for the payment of the judgment debt by instalments. That section, which is still in force, though the greater part of 7 & 8 Vict. c. 96 has been repealed, provides that where an order has been made for payment by instalments execution shall not issue until after default in payment of some instalment. That has happened in this case. The section goes on to provide that execution may then issue "for the whole of the said sum of money and costs then remaining unpaid or for each successive instalment and costs remaining from time to time unpaid as the judge shall order." The question is, Who is "the judge" who is to make the order

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under s. 61? It is true that s. 103 of the Bankruptcy Act, 1883, and the rules made under it have vested the jurisdiction and powers under s. 5 of the Debtors Act, 1869, in the judge to whom bankruptcy business is assigned; but the authority to allow execution to issue arises, not from s. 5 of the Debtors Act, 1869, but from s. 61 of 7 & 8 Vict. c. 96, and there is nowhere any provision transferring to the judge in bankruptcy the powers conferred by s. 61, and it therefore seems to me that those powers have not been transferred to the judge in bankruptcy, but remain powers which can be exercised by any judge of the High Court, including the judge at chambers. In the present case Ridley J. at chambers therefore had power to allow execution to issue for the amount of the instalments that were in arrear, and the charging order must be made absolute for that amount. The same considerations apply to the garnishee order.

Plaintiff's appeal allowed; defendant's appeal dismissed.

Solicitors for plaintiff: *Woodham Smith & Borradaile.*
Solicitors for defendant: *Jennings, Son & Allen.*

F. O. R.

[IN THE COURT OF APPEAL.]

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In re AN ARBITRATION BETWEEN THE NORTH WESTERN RUBBER COMPANY, LIMITED AND HÜTTENBACH & CO.

Arbitration—Award—Jurisdiction of Arbitrators—Sale of Goods by description—Award based on Custom subsequently found not to exist—Custom inconsistent with written Contract.

By a contract in writing sellers sold to buyers 300 tons of rubber "fair quality Banjermassin Jelutong at 18*l.* 15*s.* per ton c.i.f. Liverpool . . . . for direct shipment from the East or Straits Settlements to Liverpool . . . . " The contract contained an arbitration clause in the following terms: "Any dispute on this contract to be settled by arbitration here in the usual way." On arrival at Liverpool the buyers refused to take delivery on the ground that the goods were not in accordance with the contract. The dispute was referred to arbitrators, who found that the goods were not in accordance with contract but must be accepted by the buyers at an allowance of 10*s.* per ton. The award was based upon the existence of an alleged custom applicable to contracts for raw material to be shipped to this country, to the effect that the buyers should accept the goods with an allowance for inferiority of quality, where that inferiority was in the opinion of the arbitrators not excessive or unreasonable. Upon a motion by the buyers to set aside the award, the Court directed an issue to determine the existence of the alleged custom, and upon the trial of the issue the alleged custom was found not to exist:—

Held, that the arbitrators had no jurisdiction to deal conclusively with the question of the existence of the custom for the purpose of making their award, and that, as the custom upon which they based their award had been found not to exist in fact, the award compelling the buyers to accept goods not in accordance with the written contract was bad and must be set aside.

Hutcheson v. *Eaton*, (1884) 13 Q. B. D. 861, discussed and followed.

APPEAL from the decision of a Divisional Court (Phillimore and Walton JJ.) upon a motion to set aside an award. The following statement of the facts is taken in substance from the judgment of Vaughan Williams L.J.

On August 8, 1907, a contract was made through a firm of brokers acting for undisclosed principals for the purchase and sale of a quantity of rubber, described as Banjermassin Jelutong; the actual principals were Messrs. Hüttenbach & Co., the sellers, and the North Western Rubber Company, the buyers. The sold

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note addressed to the buyers was in these terms: "We have this day sold to you the following goods, viz.: Three hundred (300) tons shipping weight fair usual quality Banjermassin Jelutong at 18*l.* 15*s.* per ton c.i.f. Liverpool, landing weights, sellers to pay landing charges. For direct shipment from the East or Straits Settlements to Liverpool, 100 tons monthly, during September, October and November, 1907. Vessel or vessels lost, contract void. Payment cash against documents on arrival of vessel." In the margin was the following note: "Any dispute on this contract to be settled by arbitration here in the usual way."

After the arrival of the goods in this country a dispute arose upon the contract, the buyers alleging that the cargo tendered against the contract was not in accordance with it. The dispute was referred to the arbitration of two arbitrators and an umpire, who on December 4, 1907, made the following award: "We, the undersigned, having been appointed by buyers and sellers to arbitrate on 544 cases Banjermassin Jelutong ex s.s. *Ning Chow*, tendered against a contract dated August 8, 1907, do hereby award that the 544 cases are not in accordance with contract but must be accepted by buyers at an allowance of (10*s.*) ten shillings per ton off contract price. Arbitration fees, expenses and forms, 21*l.*, to be paid by sellers."

From that award there was an appeal by the buyers to the appeal committee of the Liverpool General Brokers' Association, the material part of whose award, dated December 9, 1907, was as follows: "The appeal committee, having heard the case and duly examined and considered the evidence submitted to them, resolved that the award of the arbitrators be, and the same is hereby, upheld, and that the appellants pay the costs of the appeal."

A motion was then made in the Divisional Court on behalf of the buyers that the awards should be set aside on the following grounds: (1.) That each of the awards was bad on its face, as shewing that the Jelutong tendered under the contract was found not to be in accordance with the contract, and yet that it must be accepted by the buyers; and (2.) that the appeal committee exceeded their jurisdiction in requiring the buyers to accept

delivery of the Jelutong. In the Divisional Court the buyers contended that the award was bad on its face because the findings of the arbitrators were inconsistent, but the Court held that the award was not bad on that ground, being of opinion that there might have been evidence before the arbitrators which would justify both findings. On the question of excess of jurisdiction the buyers contended that under the submission on the face of the written contract the arbitrators had no jurisdiction to inquire into or deal with the questions (a) whether the alleged custom existed, and (b) whether the contract was subject to such custom, if it existed in fact. The decision of the Divisional Court (Phillimore and Walton JJ.) was delivered on January 29, 1908, by Walton J., who, in dealing with the case of *Hutcheson* v. *Eaton* (1), an action on an award in which the jury negatived the existence of an alleged custom, cited the following passage from the argument (2): "In the present action the arbitrators have decided in favour of the defendants; their decision was based upon a custom alleged by the defendants to exist, whereby a broker is absolved from liability when he gives up the name of his principals. This being the ground of the arbitrators' decision, the custom must be taken to be good and valid, even although the jury have found that it did not exist." The answer to that contention, said Walton J., was that the arbitrators had no authority to insert in the contract what was really a new term, and upon that ground the majority of the Court of Appeal (Brett M.R. and Bowen L.J.) held the award to be bad, Fry L.J. dissenting. Ultimately Walton J., after discussing the judgments in *Hutcheson* v. *Eaton* (1), said: "It seems to me impossible to resist the conclusion that in *Hutcheson* v. *Eaton* (1) the Court of Appeal held that under a submission to arbitration of all disputes upon a written contract the arbitrators have no jurisdiction in arriving at their award to inquire as to the existence of a custom to which no reference is made in the written contract and to decide that such contract is subject to such a custom. On this ground, and this ground only, we think the award in question is not in itself binding or conclusive between the parties."

(1) 13 Q. B. D. 861. (2) 13 Q. B. D. at p. 865.

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At the conclusion of the judgment in the Divisional Court it was agreed by counsel that an issue should be directed to determine the question of the existence of the alleged custom, which should be tried by Walton J., who, after the trial of the issue, was to have the power of making such order on the motion to set aside the award as would be made by the Divisional Court. The alleged custom was stated by the sellers in the following terms: "In a contract for raw material to be shipped, which contains an agreement to settle all disputes by arbitration in the usual way, and in which there is no express provision that the buyer is to be at liberty to reject the parcel if found not to be up to the quality mentioned in the contract, it is the invariable custom that, provided that the inferiority of quality is not in the opinion of the arbitrators excessive or unreasonable, the buyers should accept the goods with such an allowance for inferiority of quality as the arbitrators may award." The answer of the sellers to the statement of custom was as follows: "(1.) The alleged custom does not exist. (2.) The alleged custom is inconsistent with the written contract. (3.) The alleged custom is unreasonable in the general applicability of it alleged, or alternatively where the buyers are manufacturers. (4.) The alleged custom is uncertain."

Upon the trial of the issue a large body of evidence was called by both sides, and ultimately Walton J. found that the alleged custom did not exist in fact. He therefore held that *Hutcheson* v. *Eaton* (1) was directly in point, and gave judgment in favour of the buyers that the awards should be set aside. The sellers appealed.

J. A. Hamilton, K.C., and *A. B. Shaw*, for the appellants. For the purpose of deciding a dispute under a written contract which has been submitted to him an arbitrator must first construe the contract. The question whether a custom exists by which a term is to be read into the written contract must therefore be dealt with by him; his decision on that question is within the jurisdiction conferred on him by the submission, and is therefore, in the absence of misconduct on his part, final. It

(1) 13 Q. B. D. 861.

cannot be successfully contended that, after he has determined that question, the validity of his award depends upon whether it can be proved that the custom exists. It is not contended that, if there were no evidence of a custom, the arbitrator would be justified in assuming that there was one; but, if there be conflicting evidence as to the existence of the custom, the arbitrator must of necessity determine that question; it is one of the matters referred to him by the submission. The point actually decided in *Hutcheson* v. *Eaton* (1) was different from that which arises in the present case, though some of the expressions in the judgment of Brett M.R. are possibly wide enough to include it. In that case the custom did not bear on the question whether by the contract it was a condition precedent that goods should be of a certain quality, or whether the purchaser could be compelled to accept goods of an inferior quality subject to a deduction from the price; the custom set up was one by which one of the parties to a contract was changed, which raised a question obviously different from that in the present case. In such a case it might well be contended that it was not within the jurisdiction of the arbitrator upon the submission of a dispute under the contract as originally constituted to find conclusively that such a custom existed.

The fact that the appellants consented to the statement of an issue does not estop them from contending that the arbitrators had jurisdiction to determine the question of the existence of the custom. The decision of the Divisional Court was that the validity of the award depended on whether the custom in fact existed, and that it was necessary to determine that question; the defendants' consent only went to the question how the existence of the custom should be determined.

Upon the evidence the learned judge should have found that the custom existed. It is not in itself unreasonable. If it be contended that it is unreasonable as between merchants and manufacturers, the answer is that, when the contract was entered into, the appellants had no notice that they were dealing with manufacturers. In such a case undisclosed principals, if they come forward and seek to enforce the contract, can only do so on

(1) 13 Q. B. D. 861.

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the same footing as if they were merchants. [They also cited *In re Walkers, Winser & Hamm and Shaw, Son & Co.* (1); *In re Keighley, Maxsted & Co. and Durant & Co.* (2)]

Isaacs, K.C. (*Leslie Scott* with him), for the respondents. In this case the respondents sought to set aside the award as being bad upon its face, and the only answer made by the appellants was the existence of the alleged custom. The object of setting up the custom was to shew that the award was good, and the appellants sought, and were compelled to seek, to establish its existence in point of fact. The question then arose as to whether that question should be determined by affidavits or by an issue, and the appellants consented to an issue. They cannot now be heard to say that the question whether there was in fact a custom is immaterial. There was no evidence of a custom before the arbitrators, who differed in opinion as to its existence; the umpire thought it existed. The question of the existence of the custom was raised by the appellants themselves to meet the difficulty as to the validity of the award. It was not really disputed that, if there was no such custom in fact, the award was invalid.

[He was stopped by the Court.]

July 14. VAUGHAN WILLIAMS L.J. Before dealing with the history of this case I will state the conclusion at which I have arrived and the grounds upon which it is formed. I am of opinion that the appeal fails upon three grounds. First, because, according to the majority of the Court of Appeal in *Hutcheson* v. *Eaton* (3), arbitrators are not the proper tribunal to decide conclusively the existence of a custom; we are bound to follow that decision. Secondly, on the ground that the contract is a sale by description, involving as a condition that the goods sold should be "of fair usual quality," and that the arbitrators had no right to convert what was only a condition into a warranty, which is the result of the finding in the respective awards. Thirdly, on the ground that the appellants, having accepted an issue as to the existence of the alleged custom, are bound by the result.

(1) [1904] 2 K. B. 152. (2) [1893] 1 Q. B. 405, 409.
(3) 13 Q. B. D. 861.

The history of the case is this. [His Lordship stated the facts substantially as they appear above, and proceeded:—] I propose now to point out the fact that, after the judgment of Walton J. in the Divisional Court had been delivered, the counsel for the parties agreed to the trial of an issue as to the existence of the alleged custom. In my judgment that issue was ordered under such circumstances that neither party ought to be permitted afterwards to say that it was an immaterial issue; this is shewn by the shorthand notes of what passed in Court after the delivery of the judgment. The issue was tried by Walton J., who found that the alleged custom did not exist. At the trial there seems to have been some confusion as to the respective functions of the Divisional Court and of Walton J. himself; he did not try it as a member of the Divisional Court, but at the end of his judgment he determined matters which were more properly for that Court; but counsel for the respondents does not rely only upon an objection based upon a mere irregularity.

To come to the cases which have been cited in argument, the first of which is *Hutcheson* v. *Eaton*. (1) Although I should myself come to the conclusion, which the majority of the Court agreed to be the basis of their decision, that the arbitrators were not the tribunal to deal conclusively with the question of custom or no custom, and although the majority based their decision ultimately on the finding of the jury that there was no such custom, yet there are passages in the judgments of Brett M.R. and Bowen L.J. which shew that they did in part rest their judgment on reasons which are hardly consistent with one another. If we take the judgment of Brett M.R., he seems to have come to the conclusion (inter alia) that the arbitrators had nothing to do with the question whether there was a custom or not. He says, speaking of the custom of trade in the case of such a contract, that if the brokers who made it disclosed the name of their principals they were no longer liable upon it. "I will not enter into the question of whether that evidence was admissible or not. The jury have found against the alleged custom." When I first read that passage I was somewhat

(1) 13 Q. B. D. 861.

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puzzled, for it seemed to me that it was a constant practice in the case of a written contract that, if there was in fact a custom, the Court should try to read it into the contract; but I think that what Brett M.R. meant is fairly clear. The question was whether evidence could be admitted of the existence of a custom inconsistent with the written contract, and I take it that the law is clear that, if there is a plain contradiction between the alleged custom and the express words of the contract, evidence of custom is not admissible. In that case reliance was placed in argument on the case of *Southwell* v. *Bowditch* (1), the head-note of which case in the Divisional Court is: "The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms:—'I have this day sold by your order and for your account to my principals about five tons of pressed anthracene.' Held, that the defendant might be made personally liable in an action for goods sold and delivered upon the contract." That decision was reversed in the Court of Appeal, consisting of Jessel M.R., Kelly C.B., Mellish L.J., and Pollock B., and there are several passages in the judgment of Jessel M.R. which seem to rest on the same legal proposition. That learned judge says (2): "The difference of opinion" (in *Humfrey* v. *Dale* (3)) "depended on this—the Statute of Frauds required a contract in writing, and of course the usage could not be contradictory to the contract, or it would not be binding. It must be explanatory of the contract, and the point upon which the judges differed was whether the usage was explanatory or contradictory. They quite agree that, if explanatory, it may be admitted; if contradictory, it could not be admitted." That is what Brett M.R. was referring to when he said he would not enter into the question of admissibility. Jessel M.R. continues: "The real point, as I said before, was whether in that particular instance the usage was contradictory or explanatory. I know some of the judges attempted to get over the difficulty by saying it was additional, but addition, if pure addition, is not explanation. It is a new contract, and

(1) (1876) 1 C. P. D. 100, 374.

(2) 1 C. P. D. 374; 45 L. J. (Q.B.) 630. The citations from the judgment of Jessel M.R. are taken from the Law Journal report.

(3) (1858) E. B. & E. 1004.

therefore a pure addition would require to be in writing; but again there could have been no difficulty in saying this, that though, in an action upon the written contract, the mercantile usage might not be admissible for the purposes of contradicting the contract, because it would be additional, the contract implied by usage might still be available for the purpose of charging the defendant." And further on he cites from the judgment of Lord Campbell C.J. in the Court below in *Humfrey* v. *Dale* (1): "The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract."

To come back to the judgment of Brett M.R., he says (2) that the arbitrators had no right to deal with the question at all; his words are: "Now the question is, had they any jurisdiction to inquire into the evidence of that custom or not? Can a question, whether a custom is to be added to the written contract and thus to control the meaning of this contract, be held to be 'a dispute arising upon this contract'? It seems to me that it cannot. Then if it cannot, what have the arbitrators done? The arbitrators have assumed to decide, and have only decided something which they had no authority to decide, and they have wholly refused to consider, or to decide, that which was within their jurisdiction." I do not think that he means that there was misconduct in coming to their conclusion, which was that this was a fatal preliminary objection; that being so, they could not, of course, try anything else. Then he continues: "If that be a true proposition, it seems to me that what they have decided they have decided without jurisdiction, and, they having declined to exercise the only jurisdiction which they had, the award cannot be supported on any ground, and that it is a mere nullity as between the plaintiffs and the defendants in this case. It is not a case where an arbitrator has assumed to decide something within his jurisdiction, and where he is alleged to have decided it wrongly. It is not a case where an arbitrator has assumed to decide something within his jurisdiction, and

(1) (1857) 7 E. & B. 266, at p. 273. (2) 13 Q. B. D. at p. 866.

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is alleged to have misconducted himself with reference to it." It seems to me that, taking the judgment of Brett M.R. as a whole, he must have meant that the arbitrators had no right to decide finally and conclusively the matter which gave themselves jurisdiction; for, when we look at the judgment of Bowen L.J., it is clear that he thought they had the right and duty to enter on the inquiry unless, when they came to deal with the actual custom alleged, they found that it was inconsistent with the express language of the contract. He says (1): "The arbitrators decided that there was such a custom as I have mentioned, and that that custom was to be read into the contract, and therefore they discharged the defendants from all claim. It is said on behalf of the plaintiffs that the arbitrators had no jurisdiction to decide that question. Is a dispute as to the existence of the custom a dispute 'arising on the contract'? First of all, be it observed that no such custom exists at all. That has been decided by the jury." Bowen L.J. was apparently of opinion that, if the arbitrators had decided the question whether there was a custom, and that decision had been followed in an action to enforce the award by the jury finding as a fact that that was the custom, the arbitrators would have been acting within their jurisdiction in making the inquiry and in treating the contract as enlarged by the custom. The truth of the matter is that, if the custom is not contrary to the terms of the contract, or, as Jessel M.R. says in *Southwell* v. *Bowditch* (2), to the tenor of the contract (which is the better expression), the arbitrators would be acting within their jurisdiction and would be doing no wrong if in the first instance they heard evidence and decided whether there was a custom or not. Of course, if the custom were inconsistent with the tenor of the contract, they would have no right to give effect to it. A conditional finding of arbitrators is not unusual; and such a finding happens frequently in the county court, where the jurisdiction is limited in at least two ways besides the limitation of the area of the court: first, the judge cannot try a dispute as to land where title comes in question, and, secondly, there is a money limit. On the question of title the county court judge must hear evidence and consider whether

(1) 13 Q. B. D., at p. 868. (2) 1 C. P. D. 374; 45 L. J. (Q. B.) 630.

there is a real dispute as to title; and when the High Court is deciding upon a question of mandamus or prohibition in such a case, although they will not readily reverse the decision of the county court judge, yet his decision is conditional in the sense that it is open to review. The case of *Hutcheson* v. *Eaton* (1) seems to have positively decided that arbitrators are not the proper tribunal for dealing conclusively with a question of custom, and I should have thought that the Divisional Court, on a motion to set aside an award, had jurisdiction to determine whether the custom alleged had an existence in fact.

Before leaving the case of *Hutcheson* v. *Eaton* (1) I may refer to another matter which was discussed in argument. Where we are dealing with what I may call for convenience terms of art, or with the meaning of words used in a particular trade or matter, it is not a contradiction of the written contract to say that in a particular trade certain words bear certain meanings. The times may have passed when British trade gave measure brimming over, and when a commercial contract used always to mean a little more than the quantity expressed, a definite quantity over a ton, &c.; but I do not suggest that that sort of contradiction between a contract and a custom would prevent the custom being read into the contract. In the present case, however, we are not dealing with the same sort of thing. In *Hutcheson* v. *Eaton* (1) there was an attempt to read into the contract a new clause absolutely inconsistent with it. In the present case the contract, when looked into carefully, is clearly a contract for the sale of goods by description, and though it is not a close description or easy to deal with, like a description of rice as being of a March crop, it is equally a condition of the contract; the effect of the action of the arbitrators in allowing the alleged custom to be proved was to turn the condition into a warranty.

I do not know that I need discuss the question whether the custom was unreasonable; Walton J. thought it was not. I am content to rest my judgment on what I have already said. Nor need I say anything more as to the materiality of the issue to which both parties agreed. We must hold that the finding against the existence of the custom is binding, and when once we

(1) 13 Q. B. D. 861.

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proceed on the basis that there is no such custom, the case comes within the actual details of *Hutcheson* v. *Eaton*.(1) For the reasons I have given I think that this appeal should be dismissed.

FLETCHER MOULTON L.J. I have come to the same conclusion. The case has given rise to many points that have been argued with great ability, some of them involving questions of general interest and great nicety.

There are two or three points of law which should be cleared away before coming to the substance of the case, the first of which is the interpretation to be placed on the marginal note, "Any dispute on this contract to be settled by arbitration here in the usual way." This is the fundamental submission to arbitration in this matter, and I interpret it thus: it in no way qualifies the rights of the parties under the contract, but is directed solely to the way in which those rights are to be determined. I treat this as a preliminary point, but the litigation has, I think, arisen from a misconstruction of this submission by the arbitrators, who have taken it as qualifying the rights of the parties under the contract, and not as relating solely to the mode of determination of those rights. It is too late now to go back and fundamentally change the area of discussion, but to my mind this point is itself sufficient to ensure the success of the respondents.

The next point is this. Before going to arbitration at all, the parties agreed to an appeal arbitration. I have read the two letters which constitute the submission to the appeal committee, and on their construction I am satisfied that the parties intended the appeal committee to be purely a court of appeal. In other words, the subject-matter of the appeal arbitration was to be identical with that in the lower court, and the limits of the jurisdiction of the court were precisely the same; the appeal arbitrators had an authority which would override the lower court on the same subject-matter and with the same limitations, but they were not endowed with powers not possessed by the lower court, nor was the submission in any way enlarged.

The third point is the status and effect of the issue which was

(1) 13 Q. B. D. 861.

taken by the parties. The appellants argued that the result of the issue might be wholly neglected because the point upon which it was taken was immaterial. But I think that the status and effect of the issue cannot depend upon whether it was material that the fact which it purported to decide should be ascertained. In the arbitration proceedings the one party alleged the existence of a custom, the other party denied it. The Divisional Court considered that it was important for the decision that that fact should be ascertained, and directed an issue in order to ascertain it. Upon the trial of the issue Walton J. held that no such custom existed. This decision binds both parties as res judicata, but does not preclude the appellants from contending that the existence of the custom was not material. If it is good law that whether there was or was not a custom the arbitrators had, for the purpose of determining what was before them, the power authoritatively to decide that such a custom existed, then the fact that it has been decided by the issue that there was no such custom leaves the decision of the arbitrators untouched. But none the less this issue is binding on both parties, and until it is set aside this Court must decide the case on the basis that in truth and in fact there was no such custom.

I have no doubt that the issue was rightly decided. There was oral evidence on both sides, and the decision was that of a very competent judge. When we come to examine the evidence, there was an absolute consensus that it was a most common practice to insert a clause setting out the effect of this alleged custom in contracts of this kind, and this is itself the strongest evidence that no custom existed which, if not expressly incorporated in the contract, could be read into it. In the mind of a layman there is often a confusion between custom and that which is customarily done, and he wrongly imagines that this latter amounts to a legal custom. Taking into consideration the nature of the custom here alleged to exist (a custom which is said to apply to manufacturers as well as to mere buyers and sellers of goods), I have no doubt that the issue was rightly decided and that in fact no such custom exists.

I now come to the main question in the case. The arbitration was held under a submission in a written contract of sale; and

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in my opinion it was the duty of the arbitrators to decide the rights of the parties under the contract, and neither to add to nor subtract from those rights. It was common ground that the articles tendered were not up to the description in the contract, and, looking at the award, I think there is strong reason for saying that there is error in law on the face of it. There is an unqualified finding that the goods were not in accordance with the contract, and yet there is a holding that they must be accepted. This strongly supports the view that there is an error in law on the face of the award, for if goods are not in accordance with the description in the contract of sale, the buyer may refuse to accept them. But we need not dwell on this point, because the case has turned mainly on the allegation of the existence of a custom which justified the sellers in requiring the buyer to accept the goods though they did not answer the description in the contract.

It is thus common ground that the arbitrators did not purport to decide under the written contract simpliciter; they decided under a contract which, if it had been reduced into writing, would have contained, in addition to what was in the written contract, a clause to the effect of the custom alleged. Hence the question in this case shifts to this: Had the arbitrators any right to add that clause to the written contract? No such custom existed in fact; consequently the contract did not contain the added clause. The arbitrators have, therefore, in deciding the rights of the parties under a contract, altered that contract, and the respondents contend that an award admittedly made in that way cannot be allowed to stand. The appellants reply that the arbitrators did not act capriciously.

They found as a fact the existence of a custom which, if the finding had been right, would have justified their reading this clause into the contract, and accordingly it is suggested that, as they were bound to find that fact one way or the other, now that they have found it in one way, their decision must be binding on the parties. I wholly fail to follow that argument, although it is entitled to great respect, as it seems to have been accepted by Fry L.J. in *Hutcheson* v. *Eaton*. (1) To my mind, however, it

(1) 13 Q. B. D. 861.

is essential to the existence of a court of limited jurisdiction, whether it be established by law or by agreement of the parties, that cases should arise in which it has to decide questions under conditions where a right decision on those questions would leave its award valid, while in the event of a wrong decision upon them the award would not bind the parties. I may give two examples. First, take the case of the construction of the submission to such a tribunal. A court of limited jurisdiction must, for the purpose of carrying on its functions, construe the submission, but no one would say that its construction of the submission binds the parties if it so misconstrues the submission as to extend the scope of its jurisdiction beyond the limits assigned to it. A similar case may arise even where the court has construed the submission rightly and is dealing with a complaint which is alleged to be within that construction. If it finds the facts so as to bring a matter within that construction, when in truth it is not within the scope of the arbitration, it would be unarguable to suggest that its award would be valid. No decision on a matter which was not given to the jurisdiction of this limited court can affect the rights of the parties. It is a court for certain purposes only. Consequently, if such a court has decided something which really is beyond its jurisdiction, its decision is invalid; if, on the other hand, a question as to the extent of its jurisdiction has been rightly answered by the court, its exercise of jurisdiction is valid, not because the parties are bound by its answer to the question of jurisdiction, but because the matter was in fact within its jurisdiction. In *Hutcheson* v. *Eaton* (1) Fry L.J. seems to find a difficulty in understanding how, when it is admitted that arbitrators must decide on certain facts for the purpose of exercising their functions as arbitrators, they could be said not to be the appointed parties to decide them. But they are the appointed parties to decide them only in the sense that they must do so in order to guide them in their work, and they are not the appointed parties to decide them conclusively so that their decision shall decide the rights of the parties. The parties to an arbitration do not in any way surrender any rights beyond those which by their agreement,

(1) 13 Q. B. D. 861.

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legally construed, they have put within the arbitrators' power; and no mistake of the arbitrators as to the limits of the matters committed to their decision can bring anything within the scope of their jurisdiction which the parties did not by their contract, when rightly interpreted, place within it.

For these reasons I have no difficulty in understanding how it may come to pass that such a court may have to decide whether there is a custom, although if they decide wrongly that there is such a custom and alter the contract by reading the custom into it, their award will be invalid. What did this decision as to the custom involve? I think it cannot be denied that it led to their making an alteration of the contract: no such custom existed in fact, yet the arbitrators read it into the contract; and I cannot distinguish this case from one where arbitrators alter the contract before them for any other reason, as for instance if they, having a valid written contract before them, deliberately, although with the intention of doing justice, take a previous draft which differs from it and which was never executed by the parties. The arbitrators are appointed under the written contract, and they have no right to displace it.

There is another objection which would be fatal to this particular custom; in my opinion it contradicts the written contract. The written contract must be interpreted according to law, and the law is that, unless he has agreed to the contrary, a buyer is not obliged to accept goods which do not answer the description in the contract. The custom set up in the present case affects cases where the goods are not according to the description in the contract just as much as it affects goods which are not according to a warranty in a contract. The contract in this case therefore requires the goods to be in accordance with the description, while the custom relieves the vendor from this obligation and entitles him to require the purchaser to accept that which is not in accordance with the description. In my opinion, therefore, this custom could not be regarded, because it contradicted the terms of the written contract.

I think it unimportant to decide whether the error of the arbitrators was an excess of jurisdiction or whether it was technically improper behaviour of the arbitrators in not deciding

according to law. The relief is the same in both cases, and rests on the same facts. In my opinion they did not purport to decide according to English law, but according to some mercantile law which was the creature of their own imagination and did not exist in fact. Their duty was to construe the contract, but they arrogated to themselves the right of adding to that contract and construing the contract so altered. From any point of view the award is, in my judgment, one which cannot stand, and the appeal should be dismissed.

BUCKLEY L.J. I feel myself constrained to agree with the proposed order, and none the less because, if I were at liberty to apply my own judgment to the facts, I should, as at present advised, have come to a contrary decision. I say "as at present advised" because we have heard counsel for the respondents for a few minutes only, and he might, no doubt, if he had been heard at greater length, have advanced reasons for dismissing this appeal which would have convinced my judgment in his favour apart from the points which I am going to mention.

I concur in the proposed order for two reasons only; first, the authority of *Hutcheson* v. *Eaton* (1), and, secondly, the unappealed order for the trial of the issue in this case. I need say but few words upon each of these points. Where, between persons engaged in a trade, a contract is made, and a custom is alleged to exist in the trade which affects the contract, the matter stands thus: Having regard to the fact that the persons who are speaking in the contract are proved (if the custom is proved) to mean by their language something which in the absence of evidence they prima facie would not mean, then the construction of the contract necessarily involves, in my opinion, the consideration of the custom. Where the language of a speaker has acquired a conventional meaning—which may be involved in a custom—one is no longer at liberty to say that his words have their ordinary signification and no other; one is bound to have regard to the fact that in the mouth of the particular speaker they may mean something different. If the construction of a contract is for the arbitrator, then, in a case where reliance is

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placed on a custom, I take it that it is for the arbitrator to determine whether the alleged custom in fact exists, and whether the construction of the language of the contract is affected by it. In such a case I do not see how, in determining the custom, it can be said that you are adding to or altering the contract; the question is what is the contract, having regard to the existence of the custom, if there be one?

It follows from what I have said that I prefer the view of Fry L.J. to that of the majority of the Court of Appeal in *Hutcheson* v. *Eaton* (1); the decision of the majority proceeded expressly upon the ground that the custom was an addition to, and an alteration of, the contract. Brett M.R. says (2): "As far as I am aware, no case has decided that an arbitrator who has authority to decide a dispute arising on such a contract as this which is specified and described has also authority to say what the contract is, in this sense, that he has a right to add something to the contract which is not expressed in it"; and Bowen L.J. says (3): "It is not a question of construction of the contract, but it is a question of altering a contract and even construing it after it has been violently altered." At the same time I am not sure that Bowen L.J. would have differed from Fry L.J. if the question in *Hutcheson* v. *Eaton* (1) had been the question which we have to decide in this case, for he says: "I will assume that the interpretation of this clause would not exclude disputes on the interpretation of the contract." However, while I should not have arrived at the same conclusion had I been free to form an independent opinion, I yield to the language of those learned judges.

It may be that it is possible to differentiate this case from *Hutcheson* v. *Eaton*. (1) The question in that case was not as to the meaning of the language used in the body of the contract, but as to the person liable under the contract; the question was whether the defendants, who had signed it, had ceased to be liable under it upon disclosing their principals: that was the custom alleged. The point is different to the point in

(1) 13 Q. B. D. 861. (2) 13 Q. B. D. at p. 867.
(3) 13 Q. B. D. at p. 869.

the present case. Here the question is whether the words "300 tons shipping weight fair usual quality Banjermassin Jelutong at £18 15*s.*" are to be taken without qualification, or whether they mean 300 tons of fair usual quality at 18*l.* 15*s.*, or of inferior quality within reasonable limits at such lesser price as may be thought proper. That is a question as to the meaning of the language of the body of the contract, and is a question different to that in *Hutcheson* v. *Eaton*. (1) But although I think that there is this distinction between the two cases, I do not propose to base my judgment upon it; the question is rather one for the House of Lords, should this case be further appealed. As the language of the majority of the Court of Appeal in *Hutcheson* v. *Eaton* (1) may be taken as covering the present case, I think that I ought loyally to apply it and to concur with my learned brethren in dismissing this appeal.

The second ground for my judgment is material only to this particular case. A motion was made by the buyers to set aside the award, and, after considerable argument before the Divisional Court, an order was made for an issue as to the existence of the custom which was alleged to have been acted upon by the arbitrators. No doubt the sellers contended that the issue ought not to have been granted; but it seems to me that their counsel accepted the issue as a solution of the difficulty, and I do not think the sellers can now successfully urge that the issue was not warranted and was immaterial. The order for the issue was never appealed, and it is not competent for the sellers now to contend that it ought not to have been directed. The issue was in fact tried by Walton J., who, after trying it, made the order of May 5, as representing the Divisional Court, which contained the finding that the alleged custom did not exist. That order has been appealed, but no appeal has been brought against the order directing the issue, which in itself constitutes a most formidable difficulty in the way of the sellers. I agree, therefore, that this appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I had intended to cite in my judgment the case of *Peek* v. *North Staffordshire Ry. Co.* (2), with

(1) 13 Q. B. D. 861. (2) (1863) 32 L. J. (Q. B.) 241.

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especial reference to the passage in the judgment of Blackburn J. (1) in which he quotes the opinion of Parke B. in *Neilson* v. *Harford*. (2)

Appeal dismissed.

Solicitors for appellants: *Linklater & Co.*

Solicitors for respondents: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

W. J. B.

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[IN THE COURT OF APPEAL.]

McDONALD *v.* OWNERS OF THE STEAMSHIP BANANA.

Employer and Workman—Compensation—Accident arising out of and in course of Employment—Evidence—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A donkeyman, whilst returning on board his employers' ship from the shore, fell off the gangway and struck an iron girder and was killed. His widow applied for compensation under the Workmen's Compensation Act, 1906, but adduced no evidence as to the purpose for which the deceased went on shore:—

Held, that the applicant had failed to prove that the accident arose out of and in the course of the deceased's employment.

APPEAL from an award of the deputy county court judge of Liverpool under the Workmen's Compensation Act, 1906.

The applicant was the widow of Thomas Patrick McDonald, who was employed by the respondents as donkeyman on their steamship *Banana*. On January 4, 1908, while the *Banana* was lying at the port of Bremerhaven, McDonald went ashore and, while going on board on his return from the shore, fell off a gangway leading from the quay to the ship and was killed. The only evidence adduced by the applicant as to the circumstances attending the accident was an entry in the ship's official log. The entry stated as follows: "11.15 Jan. 4 1908—Thomas McDonald, donkeyman, whilst returning on board ship from the shore more or less the worse for liquor refused the aid of night watchman and policeman to assist him up the gangway

(1) 32 L. J. (Q. B.) at p. 253. (2) (1841) 8 M. & W. 806, at p. 823.

and on reaching the top step suddenly overbalanced and fell over the gangway man-ropes dropping between the ship and quay and striking the iron girder before reaching the water." The entry went on to state that assistance was immediately rendered, and that, although life was apparently extinct, measures were taken to restore respiration until the arrival of the ambulance, when death was proved and the body conveyed to the city hospital.

At the conclusion of the applicant's case counsel for the employers submitted that the applicant had failed to discharge the onus which was upon her of proving that the accident arose out of and in the course of the deceased's employment.

The deputy county court judge said that the entry was perfectly consistent with the view that the accident arose out of and in the course of the deceased's employment or that it did not, but he thought that he was entitled to draw the inference from the entry in the ship's log that the deceased was returning to his ship in pursuance of his obligation and died from accident arising out of and in the course of his employment, there being nothing in the entry which entitled him to assume otherwise; and he awarded the applicant 300*l.*

The employers appealed.

Atkin, K.C., and *Keogh*, for the appellants. The question in this case is whether the deputy county court judge was justified in holding upon the evidence that the accident arose "out of and in the course of the employment." The only evidence is the entry in the log. It is said that having regard to that entry the accident necessarily arose "out of the employment." The evidence is that he was killed whilst returning to the ship. It is consistent with that evidence that the deceased left the ship on business quite independent of the employment. If a servant is wrongfully absent from his employment and in returning meets with an accident, it cannot be said that the accident arises "out of the employment." Assuming that he was rightfully absent, that would not justify the holding that the accident arose "out of the employment": *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1);

(1) [1899] 1 Q. B. 141.

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Benson v. *Lancashire and Yorkshire Ry. Co.*(1); *Robertson* v. *Allan Brothers & Co.*(2)

C. A. Russell, K.C. (with him *W. H. S. Oulton*), for the respondent. Each case must depend upon its own special circumstances. Here the deceased, a member of the crew, was returning on board by the means provided for that purpose by his employers. Prima facie that was an act done in the course of his employment, and in the absence of evidence to the contrary the county court judge was entitled to draw that inference: *Mitchell* v. *Glamorgan Coal Co.*(3)

Atkin, K.C., in reply, cited *Pomfret* v. *Lancashire and Yorkshire Ry. Co.*(4)

Cur. adv. vult.

July 31. COZENS-HARDY M.R. The question in this appeal is whether a donkeyman in the *Banana* who met his death at Bremerhaven died through an accident arising out of and in the course of his employment. The only evidence is an extract from the log-book. [The Master of the Rolls read the entry.] The deputy county court judge said, and it seems to me with truth, that this entry leaves it that a conclusion perfectly consistent can be drawn either that the man met his death by an accident arising out of the employment or otherwise. But he went on to say that in order to find against the applicant (the widow) it would be necessary to assume that this man was doing something he had no business to do; that he had gone ashore without leave, and that in that way the accident was not in the course of the employment; and he held that the entry in the official log was evidence entitling him to infer that the deceased met his accident arising out of and in the course of his employment, there being nothing in the entry warranting him to assume otherwise, and he awarded 300*l.* In my opinion this award cannot stand. Nothing more has been proved than that the man fell on his way back to the ship. It does not appear (1.) whether he had gone ashore on ship's business, or (2.) whether he went ashore on a spree without leave, or (3.) whether he had

(1) [1904] 1 K. B. 242.
(2) (1908) 124 L. T. Jo. 548.
(3) (1907) 23 Times L. R. 588.
(4) [1903] 2 K. B. 718.

leave to go ashore. In this case, as in all similar cases, it is for the applicant to prove affirmatively that the accident arose out of and in the course of the employment. There is no presumption in favour of the applicant. If the only evidence is equally consistent with either view the applicant fails. I do not mean to suggest that the county court judge is not at liberty to draw an inference from facts which are proved when there is no direct evidence, but there must be some circumstances to justify such an inference. He is not at liberty to presume that the man was doing his duty until the contrary is proved. The accident in the present case did not happen on the ship, although the man was very close to the ship on his way back. I have stated three possible events. If he was sent ashore on a ship's errand he would be within the Act. If he went ashore without leave he would plainly not be within the Act. If he went ashore, not on a ship's errand, but with leave and for his own pleasure, I think he would equally not be within the Act. To give an illustration, which possibly appeals to most of us, if I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house, I should be liable. If, however, he, having a night off, goes—as he is at full liberty to go—to the Franco-British Exhibition for his own amusement, and meets with an accident at the same spot, I take it that I should not be liable. The result is that in my opinion Mr. Keogh's contention before the deputy judge ought to have prevailed. There is no evidence that the man's death was due to injury by accident arising out of and in the course of his employment. The appeal must be allowed, with costs here and below.

FARWELL L.J. The onus of proof is on the claimant; it is not enough for her to prove that the deceased was in the employment of the defendants and that the accident happened during such employment. She must shew affirmatively that the accident arose out of or in the course of his employment, and this point is clearly raised by the employers in their defence. Now the only evidence is the entry in the log. The county court judge has said that "the entry leaves it so that a conclusion can be

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drawn either that the man met his death by an accident arising out of his employment or otherwise," and I agree with him. The man was not on board the ship, but on the gangway; he was returning, but had not reached his destination. He may have gone ashore on a spree without leave, he may have gone ashore with leave for his own purposes, or he may have gone ashore on some errand connected with the ship. The entry is equally consistent with either of the first two alternatives, but perhaps less so with the third, as if that had been the case one would have expected it to be stated in the log. Now in the two first alternatives the employer would not be liable, and in the third he would be liable. Under those circumstances we are bound by *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (1), of which I will venture to read a very small portion. "The burden," says Lord Collins, "and the whole burden, of proving the conditions essential to the obtaining an award of compensation rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him. In my opinion the evidence in the present case is quite consistent with the view that the accident happened in consequence of something which did not arise out of the employment. There seems to be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in *Wakelin* v. *London and South-Western Ry. Co.* (2)" Then on the further hearing, on page 726, he disposes of another suggestion. "In the present case the county court judge has based his judgment upon his right to assume that everything had been properly done; he has relied upon the proposition 'Omnia præsumuntur rite esse acta'; but I do not think that that is the correct view to take, or that there is any such presumption in such a case as that before us, for in *Wakelin* v. *London and South-Western Ry. Co.* (2) the House of Lords declined to act upon the presumption that the deceased man had behaved with care. There being no such presumption as that suggested, the onus in the present case is upon the applicant to

(1) [1903] 2 K. B. 718. (2) (1886) 12 App. Cas. 41.

shew that the accident arose out of, as well as in the course of, the employment of the deceased." I think that it would be very unfortunate, and would add much to the difficulties of county court judges in administering the Act, if we attempted to draw subtle distinctions in order to avoid a well-settled rule of universal application, that it is for the plaintiff to prove his case. *Mitchell* v. *Glamorgan Coal Co.* (1) does not in any way assist the respondent, for the President said: "If the known facts were equally consistent with either alternative the plaintiff was not entitled to succeed, because no one could reasonably draw the inference in his favour, but where the known facts were not equally consistent the case was totally different, because one must bring in one's knowledge of what happened in ordinary life." That case really does not assist. I agree, therefore, that the appeal must be allowed.

KENNEDY L.J. With regret, for I feel that it is quite possible that the deceased seaman was in fact at the time of the fatal accident returning on board his ship from a visit ashore made in the course of his duty as a seaman, I feel myself obliged to concur in the conclusion at which, as they have stated in their judgments, the Master of the Rolls and Farwell L.J. have arrived. It is clear that it lay upon the claimant, the widow, to prove that the husband met his death through an accident which arose not only in the course of, but out of, his employment. The learned county court judge has found, apart from the entry in the official log of the *Banana*, that the facts adduced before him were equally consistent with his having met his death by an accident which did not as with his having met his death by an accident which did arise out of his employment. The learned judge has based his decision in favour of the claimant solely upon an inference in favour of the former theory, which he conceived himself entitled to draw from the absence in the entry of the official log of any statement that the deceased had absented himself from the *Banana* without leave or for his own private purposes. I feel myself obliged to say that I can find no sufficient basis for this inference. The entry is one signed by

(1) 23 Times L. R. 588, 589.

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Kennedy L.J.

North, A.B., the night watchman. It was made after the death of McDonald for the proper purpose of recording the fact of his death by accident. As the man was dead, there was no duty under the Merchant Shipping Act, 1894, upon the person who made the entry to state, if it was the fact, that the deceased had been absent from the ship without leave or solely on his own private business. The Merchant Shipping Act, 1894, s. 240, sub-ss. 2, 3, and 5, prescribes a duty to enter in the official log an offence committed by a member of the crew only when it is intended to prosecute, or to enforce a forfeiture or to exact a fine, or where punishment is inflicted on board for such offence. There was no legal duty in this case to do more than enter the fact of the seaman's death by accident. I am of opinion, therefore, that the inference from the absence in the entry in the official log of any statement that McDonald had been absent from his ship without leave, or for a purpose outside his employment, was unwarranted, and as that inference is the only ground upon which the conclusion of the learned county court judge is founded, I do not think that his judgment can stand, as the claimant, in order to succeed, was bound to prove at least some fact which was more consistent with the accident causing McDonald's death arising out of his employment than with the contrary view. At the same time I wish to be understood as deciding upon the particular facts of this case in this respect, that we have to consider the case of an accident happening to a man at a place where he would not necessarily or naturally be in order to fulfil the duties of his employment. I express no opinion as to the propriety or impropriety in point of law of an inference bringing an accident within the terms of the Act of Parliament where that accident has happened upon the premises where the workman's service is to be rendered to his employer, as, for example, if this workman had been found fatally injured by a fall in the stokehold or any other part of the ship where, in the course of his duty, he might naturally and properly be, although there were no circumstances to shew why at the particular moment he was there or what the particular duty was which called him there. In the present case the accident happened whilst McDonald was outside the ship, and without proof that there was anything which at the

time and place of the accident made it part of the duty of his service to incur the risk which proved fatal. I agree that this appeal ought to be allowed.

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Appeal allowed.

Solicitors: *Lawrence Jones & Co.; Windybank, Samuell & Behrend, for Fox & Bradley, Liverpool.*

H. B. H.

[IN THE KING'S BENCH DIVISION AND THE COURT OF APPEAL.]

K. B. D. 1908 *Jan.* 25; *May* 25.

C. A. 1908 *July* 15, 16, 22.

KENT *v.* FITTALL (No. 2).

Parliament—Franchise—Objection—Prima facie Proof of Ground of Objection—Rebutting Evidence—Evidence of Repute—Jurisdiction of Supreme Court to direct Revising Barrister to hold fresh Revision Court—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 10.

The provisions of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, which require an objector to give prima facie proof of the ground of his objection before the revising barrister, and provide for the giving of such prima facie proof to the satisfaction of the revising barrister "by evidence, repute, or otherwise," are in aid of the objector, who may give prima facie proof of his objection by evidence of repute; the sub-section does not authorize the revising barrister to rely upon evidence of repute as distinguished from proof in order to defeat the objection.

Where the Court, upon the hearing of a case stated by a revising barrister, is of opinion that the effect of proceedings before the revising barrister is to shew that certain entries in the lists of voters of names objected to have not in fact been revised according to law, it may in the exercise of its inherent jurisdiction direct the revising barrister to hold another Court for the revision of those entries, notwithstanding that the period limited by statute for revising the lists has expired.

APPEAL from the decision of a Divisional Court upon a case stated by the revising barrister for the borough of Devonport in compliance with an order of the Court of Appeal directing him to state a case. During the argument in the Divisional Court the case had been sent back to the revising barrister for a further

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statement of facts, and in its amended form when it came before that Court for decision it was as follows.

1. At a Court held on September 17, 1907, George James Kent duly appeared as objector in support of the objections referred to herein.

2. Due notice of objection had been given by the objector to each of the 1559 persons whose names appeared in the schedule to the case, to his name being retained on the occupiers' list, division 1, for the parish of Devonport, on the ground "That you have not occupied, as owner or tenant, the premises named in the said list for twelve months immediately preceding July 15 in this year."

3. I find as facts in the case of each of such persons (*a*) that the house, part of which was alleged to be separately occupied by such persons as a dwelling, was itself a house of the description known as an ordinary dwelling-house; (*b*) that the landlord or landlady to whom such person paid rent also resided in the house; and (*c*) that the landlord or landlady was rated and paid the rates for the whole house as a separate tenement.

4. The first case dealt with was that of Charles Bellamy, and, after proof of the three facts mentioned in the last paragraph, the objector submitted that he had, in proving the said three facts, given prima facie proof of his ground of objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878 (1), and that in the absence of proof

(1) By 41 & 42 Vict. c. 26, s. 28, sub-s. 10: "If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give prima facie proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to:

"An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list:

"The prima facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise, that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination,

by the said Charles Bellamy, or by some person on his behalf, that he was entitled to have his name inserted in the said list in respect of the qualification described therein, I ought to expunge his name therefrom in accordance with sub-s. 11 of the above section.

5. I held that, although proof of the said facts might be prima facie evidence of the ground of objection under circumstances where legal evidence only could be accepted, the prima facie proof dealt with in sub-s. 10 was to be proof to my satisfaction that there was reasonable ground for believing that the objection was well founded. I had made previous inquiry of various persons in a position to give reliable local information, including my predecessor as revising barrister in the said borough. As the result of such previous inquiry and of oral evidence given before me by the overseers and their canvassers, who were examined by me, and whom I allowed the objector to examine, I found the following facts:—That in Devonport, in the case of houses of the character described in paragraph 3 hereof, the common practice of letting is as follows: The landlord lets out his house, other than the part occupied by himself, in dwellings of from one to four or more rooms. Each of such dwellings is used by the tenant as a separate dwelling for all purposes of living, and is occupied as a dwelling-house by him; such use of the passages and staircase is let to him as is necessary or convenient for access to and enjoyment of his dwelling; the use of the w.c., and in some cases of a washhouse, is also let to him in common with the other tenants. Each tenant has the exclusive use, occupation, and enjoyment of his dwelling, and the landlord has not, either by agreement or otherwise, nor does he in fact claim or exercise, any control over the said dwelling, nor any right to enter therein, either in the tenant's absence or otherwise, nor does he have or claim, or in fact exercise, any control over the tenant in his user of his said dwelling; the tenant has a key which enables him at any hour of the day or night to gain access to the interior of the house,

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or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to."

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from which he has free access to his said dwelling, and the landlord does not reserve to himself any right to fasten the front door, nor does he in fact do so; the landlord in many cases owns two or more such houses, each of which he lets out under conditions similar to those herein set forth, himself residing in one of them, in a room or rooms, his use thereof being identical with the use by his tenants of their said dwellings; he does not reserve to himself or exercise any right of general control over the house; he contracts to keep the said house and dwellings in repair; no services are rendered to the tenant by the landlord, the cleansing of the said passages, &c., being shared by those using them.

6. By reason of the fact that the above practice of letting is, in the case of the said houses, the prevailing practice of letting in the borough of Devonport, proof of the said three facts did not as a matter of fact satisfy me that there was reasonable ground for believing that the objection was well founded, such facts being at least equally consistent with the objection being ill founded.

7. I therefore held that prima facie proof of the ground of objection had not been given by the objector. No facts other than the said three facts were proved in the case of any of the persons whose names were scheduled to the case.

8. I accordingly retained the names of the persons scheduled to the case.

9. Due notice of appeal from this decision was given in the case of each of the 1559 persons.

The question for the opinion of the Court is whether I was wrong in point of law in holding that prima facie proof had not been given in the above cases and in retaining the names of the said persons on the list.

Foote, K.C., and *Daldy*, for the appellant.

Danckwerts, K.C., and *G. W. Ricketts*, for the respondent.

May 25. LORD ALVERSTONE C.J. I think that the revising barrister has stated the appellant out of Court, and that the appeal fails. I have not changed the opinion which I expressed

in the first case of *Kent* v. *Fittall* (1), which I repeated in *Douglas* v. *Smith* (2), that no person in the responsible position of a revising barrister ought to apply a particular state of facts to a large number of cases unless he has actual proof before him, such as he is entitled to consider, that that state of facts does apply to all the cases in question. I say "proof which he is entitled to consider," because it has been established in more than one decision since the Act of 1843 that a revising barrister may act on other than strict legal evidence.

It is contended for the appellant that the evidence of repute or otherwise, which is made admissible by s. 28, sub-s. 10, of the Act of 1878, does not apply to the conclusion which a revising barrister is entitled to draw from the facts which the objector puts before him, and that, if the objector puts before him legal evidence of the three things stated in paragraph 3 of this case, the revising barrister is not entitled to discount the result of that legal evidence by repute or other information. In my opinion the answer to that contention is to be found in the fact that the three things there found are not three things which are prescribed by statute as being sufficient to support an objection in all cases. They are three things from which the Court has in many cases drawn the conclusion that the person objected to was not an inhabitant occupier, but only a lodger, and, without repeating what I said in my judgment in *Kent* v. *Fittall* (3), I think that the cases to which I there called attention established this, that on proof of those facts the Court would have held in the previous cases that the man objected to had only a lodger qualification. But although that is the result of the previous cases, it does not, in my opinion, help the present appellant, for his main proposition is that, given those three facts found in his favour, the revising barrister cannot qualify by evidence, repute or otherwise, the conclusion which he would have drawn from them. I think that, it being admitted that the revising barrister may, under the terms of sub-s. 10, allow, in favour of the objector, less than strictly legal evidence as prima facie proof of the ground of objection, it would be a one-sided construction of that enactment

(1) [1906] 1 K. B. 60.; 1 Smith Reg. Cas. 417.

(2) [1907] 1 K. B. 126.

(3) (1905) 1 Smith Reg. Cas. 417.

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if we were to hold that the effect of that evidence might not be modified by evidence, repute or otherwise, given in answer to the objector.

That being so, I come to the findings in the case itself. I am sure that the revising barrister has done his duty to the best of his ability in the statement of the case, but I do not think it wise for those whose judicial duty involves the drawing of conclusions of fact to consult others who have drawn conclusions of fact under somewhat similar circumstances in previous cases, and therefore I should have been loth to act upon the revising barrister's finding if there had been nothing beyond the statement which appeared in the case before we remitted it to him for further consideration, and which was in these words: "From previous inquiry which I had made of various persons in a position to give reliable local information, including my predecessor the revising barrister of the said borough, I had formed the opinion," &c. However lax may be the rules of evidence, I do not think that a revising barrister is justified in making a sort of general inquiry of persons who in his opinion can give reliable local information, but whose information or means of information cannot be tested, or in asking a gentleman who has drawn conclusions in one case what conclusions he ought himself to draw. But the revising barrister has now bona fide and fairly stated what evidence he had before him and the view he took of it, and, it being once admitted that he may act on less than strict legal evidence and may gauge the weight of an objection by evidence, repute or otherwise, I think there are findings in the rider inserted in the case which state the appellant out of court. The additional paragraph says: "As the result of such previous inquiry and of oral evidence given before me by the overseers and their canvassers, who were examined by me, and whom I allowed the objector to examine, I found the following facts." I think it would have been more satisfactory if the revising barrister had distinguished between the result of his previous inquiry and the result of the oral evidence; but this is perhaps an over-critical view to take of the statement of the case, and the important point is that it is not now disputed that the overseers and their canvassers had made

inquiries on this particular point, the results of which were before the revising barrister. It is suggested that in these inquiries the wrong questions were put and that the answers did not give the requisite information, but that is a point which should be taken before the revising barrister and not before us. The appellant further suggests that the shorthand notes would support his contention, but the accuracy of those notes is contested, and we cannot take them into consideration: we accept the statements by the revising barrister in the case as a fair and impartial statement of his reasons for coming to his conclusions of fact.

Having before him oral evidence given by the overseers and their canvassers, who had been cross-examined by the objector, the revising barrister finds that "each tenant has the exclusive use, occupation, and enjoyment of his dwelling, and the landlord has not, either by agreement or otherwise, nor does he in fact claim or exercise, any control over the said dwelling"—that means the tenant's dwelling—"nor any right to enter therein, either in the tenant's absence or otherwise," &c. If the revising barrister has found as a fact that the landlord does not reserve to himself or exercise any right of general control over the house, and has found it as the result of information given to him, and presumably of information given to him with regard to the particular houses, we cannot go behind his finding. As was pointed out in the Court of Appeal in *Kent* v. *Fittall* (1), if that fact has been found with regard to all the houses, we must apply the law to them all, and not merely to the particular one before us.

I am of opinion, therefore, that, as we cannot accede to the contention that the revising barrister is not entitled to consider as against the objector "evidence, repute or otherwise," when he is estimating to what extent the objection is proved to his satisfaction—and it is he who has to be satisfied as to the prima facie proof—we must hold that the revising barrister has in this case drawn conclusions of fact upon materials before him of the weight and substance of which he alone must be the judge. The appeal must therefore be dismissed.

(1) [1906] 1 K. B. 60.

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DARLING J. I regret to say that I am of the same opinion; I should much have preferred to be able to come to a different conclusion.

I do not agree with the appellant's contention as to the construction to be placed upon s. 28, sub-s. 10, of the Act of 1878, which seems to amount to this. The sub-section says that "prima facie proof shall be deemed to be given if it is shewn to the satisfaction of the barrister by evidence, repute, or otherwise, that there is reasonable ground for believing the objection to be well founded"; the contention really is that the sub-section is limited to the revising barrister's believing that the objection is well founded, and does not extend to his believing that it is ill founded, if that belief is based upon "evidence, repute, or otherwise." But if that is the proper reading of the sub-section, it would apply equally to "evidence" as to "repute," and therefore the revising barrister would not be at liberty to believe upon the evidence that an objection was ill founded, a result which, to my mind, the Legislature could not possibly have intended.

As regards the other part of the case, I think that what has happened is the natural, and in my view most regrettable, result of the judgment of the Court of Appeal in *Kent* v. *Fittall.* (1) It is true that they said in terms that they did not differ from this Court as to the law; they reversed our decision upon another ground. But I cannot help thinking that the effect of their decision has been to somewhat change the law as previously understood. I think that down to the time of that decision it had been recognized by the Courts that, if proof had been given by the objector of such matters as the three facts stated in paragraph 3 of this case, there was a presumption that the person objected to was not what he claimed to be, and that it was for him to give some evidence to shew, for example, that although the landlord resided in the house the tenant was nevertheless an inhabitant householder. But the result of that decision seems to be that for the first time a revising barrister treats the whole question which has arisen here as a matter of

(1) [1906] 1 K. B. 60.

fact. To do so is in my opinion to disregard the previous decisions on the point and to treat the finding of fact as conclusive, though it is possibly founded upon mere repute, for it may be founded upon "evidence, repute, or otherwise." The word "otherwise" seems to me to mean mere gossip, conversation, information that can be picked up. What is the question of fact which the revising barrister may decide upon such evidence? It really is that the considerations which the Courts have hitherto thought to be the essence of the question may practically be disregarded, because the revising barrister may ascertain "by evidence, repute, or otherwise" that, as regards some particular locality, they have no meaning whatever. The result is that the revising barrister may make no inquiry about the particular house in regard to which the particular claim arises; indeed in the present case the revising barrister's decision really proceeds upon the ground that he has ascertained the common practice in Devonport, which is that where the landlord lives in the house he exercises no control over the house or over the tenant, from which he concludes that each of these tenants is a householder. It might well be that in the adjoining places of Plymouth or Stonehouse a different revising barrister would require something more, and that the same class of people would be inhabitant householders in Devonport, but not in Plymouth or Stonehouse.

To my mind, therefore, the state of the law as I understand it to have been declared by the Court of Appeal is most unfortunate, and is calculated to lead to the setting up of particular franchises in various places, which is one of the very things that were swept away by the Reform Act, 1832. There may be a particular kind of franchise in Devonport, just as there used to be a pot-walloper franchise in various parts of the country, but it will be the result, not of old habits and customs of the people themselves, but of the finding of a particular revising barrister upon a particular state of facts. I regret that I cannot see my way to come to any other conclusion than that at which the Lord Chief Justice has arrived. I think that the revising barrister has done no more than under the decision in *Kent* v. *Fittall* (1)

(1) [1906] 1 K. B. 60.

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he was entitled to do, and that in so acting he has stated the appellant out of Court.

SUTTON J. concurred.

Appeal dismissed. Leave to appeal.

The objector appealed.

July 15, 16. *Foote, K.C.* (*Daldy* with him), for the appellant. The revising barrister misconstrued s. 28, sub-s. 10, of the Act of 1878. That sub-section is in favour of the objector, and throws upon the person objected to the onus of proving his right to be on the list as soon as the objector has given prima facie proof of the ground of the objection. It is not necessary that the objector should give the prima facie proof of his objection by strict legal evidence; the sub-section expressly enables him to do so by repute, of course to the satisfaction of the revising barrister; but there is nothing in the sub-section to justify the revising barrister in taking into consideration anything but legal evidence for the purpose of rebutting the objector's prima facie case. Hearsay evidence or repute is not available as an answer to the objector. In the present case the objector had given prima facie proof of his objection by proof of the three facts that the house was an ordinary dwelling-house, that the landlord resided in it, and that he was rated and paid the rates. In *Kent* v. *Fittall* (1) it was clearly laid down by Collins M.R. that where the landlord resided in a dwelling-house there was a presumption that the other persons living in it were lodgers, and the presumption there spoken of is the same thing as prima facie proof. The persons objected to in this case were therefore lodgers and not entitled to be on the list as inhabitant occupiers. It is clear from the case that the revising barrister refused to accept the objector's prima facie proof of his objection on a ground that was not open to him, that is because he knew, or supposed he knew, of a practice alleged to prevail in Devonport. [He also cited *Douglas* v. *Smith*. (2)]

[BUCKLEY L.J. We think that the case should go back to the

(1) [1906] 1 K. B. 60. (2) [1907] 1 K. B. 126; 2 K. B. 568.

revising barrister to be restated; paragraphs 5 and 7 are not consistent with each other.]

Danckwerts, K.C. (*G. W. Ricketts* with him), for the respondent. It is unnecessary to send back the case for restatement, as s. 65 of the Parliamentary Registration Act, 1843, makes the admissibility or effect of evidence a question for the revising barrister, who is not bound by the strict legal rules of evidence.

Eventually the Court framed the following questions and observations to be sent to the revising barrister for his answer.

1. Paragraphs 5 and 7 are in conflict. Paragraph 7 states that "no facts other than the said three facts were proved in the case of any of the persons whose names are scheduled hereto." Paragraph 5 finds further facts. Of what facts was proof given in the respective cases under appeal?

2. Did the revising barrister admit against the objector as facts matters ascertained, not by proof, but by repute or otherwise, and how otherwise, and, if so, what were they?

3. When and in what case was the oral evidence referred to in the red ink portion of the paragraph given? [This is the portion of paragraph 5 beginning "As the result of such previous inquiry" and going down to the end of the paragraph.]

July 22. The following answers of the revising barrister to the above questions were read.

1. The reference in paragraph 7 is to facts proved by the objector. No evidence was at any time tendered by him as to the common practice of letting prevailing in Devonport. The whole of the facts upon which I acted, as set out in the red ink portion of paragraph 5, were complete at the end of the second case, that of Charles Bellamy or Sidney Denley. As each of the subsequent cases scheduled to the case came on, the objector called out "Appeal," which by consent meant, on the part of the objector, "In this case I can prove the three facts (set out in paragraph 3) and nothing more"; on my part, "I hold as to this case that in the circumstances I have ascertained to exist in Devonport proof of those three facts alone does not constitute prima facie proof of your ground of objection"; and a reply by

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the objector, "This case will be scheduled to the case I am going to ask you to state."

2. I admitted against the objector the facts ascertained by me as set out in paragraph 5. I had ascertained no facts, other than the said three facts, which seemed to me to support the ground of objection, and, as already stated, no proof, by either evidence, repute, or otherwise, was tendered in support of the said objection.

3. The oral evidence was given in the cases of Charles Bellamy and Sidney Denley. In the former case the voter's landlady was present and was interposed as a witness while the overseers were giving evidence. I held, without deciding whether prima facie proof had been given or not, that, even assuming it had, it had been rebutted by her. It was either in Denley's case, or that immediately following, that I held, the evidence being then complete, that proof of the said three facts did not constitute prima facie proof, and the subsequent procedure as to the scheduled cases was as already described in paragraph 1 hereof.

VAUGHAN WILLIAMS L.J. We do not think that the questions put to the revising barrister have been fully answered by him, and we should be glad of his attendance, if possible, before us, in order that he may supplement the information which he has already given us.

The revising barrister accordingly attended, and, in answer to oral questions put to him by the Court, said that some of the facts stated by him in paragraph 5 of the case had been established to his satisfaction by the evidence of the overseers coupled with repute.

VAUGHAN WILLIAMS L.J. Having regard to the answer of the revising barrister to the questions which we have just put to him, it is clear that, as against the objector, he admitted evidence based upon repute, which he was not entitled to do, having regard to the language of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878. We all think that as against the evidence given on behalf of the objector the revising

barrister was not entitled to have recourse to, or to give effect to, evidence founded on repute. We think, therefore, that the proper course for us to take is to send the 1559 scheduled cases back to the revising barrister to complete their revision, as the effect of what has happened is practically that they have not been revised at all; but this is subject, of course, to what counsel may have to urge to us upon the point.

Foote, K.C. There are practical difficulties in the way of directing the revising barrister to hold another Court for the revision of these scheduled votes. The statutory period fixed for the holding of revision courts has long passed, the last day being October 12, 1907. Assuming, however, that the Court, in the exercise of its inherent jurisdiction, can order a further revision of these votes, there is the further difficulty that the paragraph originally inserted in the case, giving the Court power to amend the register by expunging the names of the scheduled persons, was struck out by the revising barrister when the case was amended.

VAUGHAN WILLIAMS L.J. It is unnecessary to deliver a long or detailed judgment in the present case. We are all of opinion that the Court has jurisdiction in a proper case to send back a case to the revising barrister for the completion of the revision by him, and in this particular case I think that, having regard to the admitted fact that the revising barrister, in answer to the objector, took into his consideration matters of repute, which under the statute he had no right to do, the whole of the scheduled cases must be sent back to him in order to complete the revision. I think that, not only in the interests of the people of Devonport, but in the interests of all persons who are interested or concerned in the work of revision, revising barristers would be well advised if, even at some expense of time, they were to conduct with somewhat more regularity the admission of evidence before them which may affect a great number of cases. It is obvious that in the present case nothing was said at the revision court which amounted to an agreement to admit the whole of the evidence in the only two cases in

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which evidence was given (and which, as it turned out, were not appealed) as evidence in all the cases scheduled as being appealed; such an agreement, if arrived at, should be expressed in clear and unmistakable language. The cases must therefore go back to be heard by the revising barrister with all possible expedition.

FLETCHER MOULTON L.J. I am of the same opinion, and I wish to say a few words with regard to s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, because I think that the revising barrister made a mistake in his interpretation of that sub-section. The effect of sub-s. 10, which consists of three clauses, is this: the objector has to support his objection by giving prima facie proof of the ground of objection. But there is often a difficulty in his doing so by reason of the fact that the right of a person to appear upon a list of voters depends upon personal circumstances which it is difficult for the objector to ascertain with accuracy. These matters are, of course, within the knowledge of the person objected to. But he may not be present at the hearing of the objection, because the Act does not impose upon the person objected to the duty of attending and supporting his right to be upon the register upon pain of having his name expunged in default of his doing so. Hence paragraph 3 of the sub-section provides that if, in making out his prima facie proof of the ground of objection, a difficulty is placed in the way of the objector by reason of the absence of the person objected to, or for some other reason (which I think must be a reason ejusdem generis) there is such a difficulty, the revising barrister may hear evidence of repute or otherwise tendered by the objector in order to complete the prima facie proof of the ground of objection. In my opinion paragraph 3 of the sub-section has no other effect than that.

BUCKLEY L.J. I agree. The revising barrister held that prima facie proof of the ground of the objection had not been given by the objector as required by s. 28, sub-s. 10, of the Act of 1878, with the result that the names objected to were retained on the list. When the case came to us on appeal from the

Divisional Court I had some difficulty in understanding it, for paragraphs 5 and 7 of the special case appeared to be mutually contradictory. Questions in writing were put to and answered by the revising barrister, and he has appeared before us to-day and answered orally certain further questions put to him. It is plain from his answer to those questions that he decided against the objector not exclusively upon the evidence given in Court by the overseers, but also upon evidence of repute. Under s. 28, sub-s. 10, of the Act of 1878, when an objection is made to a name on the list of voters, the revising barrister must require the objector to give prima facie proof of the ground of his objection. I agree that that prima facie proof is not limited to legal evidence; it may be something short of that. In establishing that prima facie proof the revising barrister "may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection"; in other words, both the revising barrister and the objector may examine the overseers and any other person as regards the prima facie proof of the ground of objection. The sub-section also contemplates that the person objected to may not be present at the revision court, and that the objector may not be able to obtain out of his mouth evidence of the prima facie proof of his objection. In such a case paragraph 3 of the sub-section defines what is the meaning of the prima facie proof mentioned in paragraph 1; prima facie proof is to be deemed to be given if something is done which would otherwise not be admissible. "The prima facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise, that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to." That is the language of paragraph 3, and it is plain that it is in favour of the objector only, who is enabled to satisfy the revising barrister of the validity of his objection by evidence of repute, which would otherwise be inadmissible; it does not empower the revising barrister to rely upon evidence of repute, as distinguished from

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proof, in order to defeat the objector. In the present case the revising barrister has admitted evidence of repute to defeat the objector, and he has not, in my opinion, adjudicated according to law upon the objections; he has not really revised these particular entries. In such a case I agree that there must be inherent power in the Court to remit the whole matter to the revising barrister for the purpose of completing the revision, for proof cannot have been given to his satisfaction if he decided upon evidence that should not have been admitted. (1)

VAUGHAN WILLIAMS L.J. Our judgment will take this form: That the order of the King's Bench Division be discharged; the costs of this appeal to be paid by the respondent; no costs in the Court below.

Appeal allowed.

Solicitors for appellant: *Ayrton, Biscoe & Barclay.*

Solicitors for respondent: *Cunliffes & Davenport, for R. J. Fittall, Devonport.*

(1) In *Mayor of Rochester* v. *Reg.*, (1857) 7 E. & B. 910; (1858) E. B. & E. 1024, and in *Reg.* v. *Mayor of Monmouth*, (1870) L. R. 5 Q. B. 251, the Court of Queen's Bench directed writs of mandamus to issue to the mayor and assessors of those boroughs to hold a court under the Municipal Corporations Reform Act, 1835, for the revision of the burgess lists, although the statutory period for their revision had expired. The present appears to be the first case in which, upon the hearing of a case stated by a revising barrister, the High Court has in the exercise of its inherent jurisdiction directed him to hold a further revision court after the expiration of the statutory period. [Reporter.]

W. J. B.

THE KING *v.* KINGHORN.

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Oct. 13.

Banker—Evidence—Order for Inspection of Books—Jurisdiction of Magistrate —Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *ss.* 7, 10.

A magistrate before whom criminal proceedings are being taken has power to make an order under s. 7 of the Bankers' Books Evidence Act, 1879, for the prosecutor to inspect and take copies of entries in the books of a bank at which the defendant keeps an account.

RULE nisi to the deputy stipendiary magistrate of Liverpool to shew cause why he should not make an order under s. 7 of the Bankers' Books Evidence Act, 1879. (1)

In the course of a prosecution before the deputy stipendiary magistrate under the Betting Acts, application was made on behalf of the prosecution for an order under s. 7, to inspect and take copies of the defendant's account in the books of the North and South Wales Bank. The application was opposed by the bank. The magistrate declined to make the order asked for on the ground that he had no jurisdiction to do so.

Leslie Scott, for the bank, shewed cause against the rule. Prima facie the definitions of "Court" and "judge" in s. 10 would seem to be wide enough to include a magistrate before whom criminal proceedings are being taken, but it is to be observed that in s. 7 the words are not "the" but "a" Court or

(1) Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7: "On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

Sect. 10: "In this Act—

"The expression 'legal proceeding' means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.

"The expression 'the Court' means the Court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken.

"The expression 'a judge' means with respect to England a judge of the High Court of Justice . . . .

"The judge of a county court may with respect to any action in such Court exercise the powers of a judge under this Act."

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judge, which suggests that the application is to be made to a Court other than that in which the proceedings are being taken. The latter part of s. 10, which enables a county court judge to exercise the powers of a judge under the Act, also shews that the general language in the earlier part of s. 10 must be read with some limitation. In *Reg.* v. *Bradlaugh* (1) Lord Coleridge C.J. doubted whether an order for inspection under s. 7 was valid if not made by a judge of the High Court, and in the Annual Practice for 1909, at p. 528, it is stated that in criminal proceedings the order is made by the judge in chambers and drawn up at the Crown Office. [He also referred to Hart on the Law of Banking, p. 214.]

[LORD ALVERSTONE C.J. referred to *Arnott* v. *Hayes*. (2)]

Rigby Swift, in support of the rule. The magistrate had jurisdiction to make the order, for a prosecution before a magistrate is clearly a "legal proceeding" as defined by s. 10. The reference to a county court judge in that section is for the purpose of enabling a county court judge to make an order under s. 6 for the production of a banker's book, which order can only be made by a judge, whereas the order under s. 7 may be made by a Court or judge, and the word "Court" as defined in s. 10 must include a magistrate before whom a legal proceeding is being held. The point does not seem to have been argued in *Reg.* v. *Bradlaugh*. (1)

LORD ALVERSTONE C.J. In my opinion this rule must be made absolute. We have been told that it has been the practice in criminal proceedings for orders for the inspection of bankers' books under s. 7 of the Bankers' Books Evidence Act, 1879, to be made by the judge in chambers. I very much doubt whether that practice has been universally followed, for I think if inquiry were made it would be found that these orders have also been made in the criminal Courts. But however that may be, what we have to consider is the language of the Act itself. Before the passing of the Bankers' Books Evidence Act, 1879, bankers could be compelled to produce their books in Court under a subpœna duces tecum, and the object of the Act was to protect bankers

(1) (1883) 15 Cox, C. C. 217, at p. 222, n. (2) (1887) 36 Ch. D. 731.

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against that inconvenience. The protection afforded by the Act is twofold. First, by s. 6 a banker shall not be compellable to produce his books unless "by order of a judge," and by s. 10 a "judge" means a judge of the High Court of Justice. Then s. 7 provides an alternative method of proof, for under that section, on the application of any party to a legal proceeding, "a Court or judge" may order that such party shall be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Having regard to the definitions of "legal proceedings" and "Court" in s. 10, it seems to me impossible to say that a magistrate before whom criminal proceedings are being taken has no power to make an order under s. 7, particularly when one finds that arbitrators are empowered to do so. I fail to see how it can be suggested that the materiality and bona fides of an application under s. 7 cannot be perfectly well considered by the magistrate before whom the proceedings are being held. Some reliance has been placed on the last clause of s. 10, which enables a county court judge to exercise the powers of a judge under the Act, but in my opinion it is clear that the object of that enactment is to give a county court judge power to make an order under s. 6 in a case which is being tried in his Court. That part of s. 10 cannot be construed as putting any limitation upon the perfectly general language of the earlier part of the section. With regard to the observations which Lord Coleridge C.J. is reported to have made in *Reg.* v. *Bradlaugh* (1), I doubt whether he intended to give a judicial decision on the point.

BIGHAM J. I agree with all that has fallen from my Lord. I base my judgment on the language of s. 7, which is quite plain. Here there has been an application for an order under that section by a party to a legal proceeding. It is said that, as the application was made to the magistrate before whom the legal proceeding was being taken, there was no power for him to make the order. I think that the section gives him power to do so in the plainest possible words, for the section says that "an order under this section may be made either with or without

(1) 15 Cox, C.C. at p. 222, n.

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summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or judge otherwise directs." The expression "the Court" is only to be found in s. 7; it occurs nowhere else in the Act; and it is "the Court" which is defined in s. 10 to mean "the Court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken." It is therefore perfectly obvious to my mind that the person sitting in "the Court" must mean the magistrate sitting in the Court in which the application is made.

WALTON J. I agree.

Rule absolute.

Solicitors for the bank: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the prosecution: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

F. O. R.

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LAWSON, APPELLANT *v.* EDMINSON, RESPONDENT.

Licensing Acts—Permitting Drunkenness — Guest after closing Hours — Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.

Two men, who were found drunk on licensed premises after closing hours, were proved to be guests of the licensee and to have been supplied with drink at his expense after closing hours:—

Held, that the licensee was liable to be convicted under s. 13 of the Licensing Act, 1872, of permitting drunkenness upon the premises.

CASE stated by the justices for the county of Durham.

The appellant Lawson was an inspector of the Durham county constabulary, stationed at Southwick, in the county of Durham. The respondent Edminson was an alehouse keeper carrying on business at the Queen's Head Hotel, Adelaide Street, Southwick. On March 21, 1908, the respondent appeared before the justices sitting as a Court of summary jurisdiction at Sunderland for the Sunderland petty sessional division of Easington ward on a summons issued upon the information of the appellant charging him, the respondent, under s. 13 of the Licensing

Act, 1872 (1), that he, on March 1, 1908, at the township of Southwick, in the said county, then being duly licensed to sell by retail intoxicating liquors in his house and premises there situate, unlawfully did permit drunkenness to take place on the said licensed premises, contrary to the form of the statute in such case made and provided.

The following facts were admitted or proved :—Sergeant Rispin and Police Constable Wilson, on approaching the Queen's Head Hotel, Adelaide Street, Southwick, about 1 o'clock in the morning of March 1 last, observed lights and heard voices in the hotel, and, having obtained admission, found therein the wife of the respondent, her father and mother, and ten other persons, including two men named Wilson and Massingham. The following explanation as to their presence was given to the police by Mrs. Edminson, the wife of the respondent: "My father and mother are here from Wardley colliery, and we are having a bit of jollification. There has been no drink supplied since closing time ; besides, this room is not licensed for drink. I have stood drinks round." In so far as this explanation was tested it was found to be correct, and the justices accepted it as correct. The men Wilson and Massingham were both drunk. Massingham, before becoming the private guest of the respondent, had been on the premises as an ordinary customer, but there was no suggestion that he had been drunk while there as a customer. Wilson came to the premises as a private guest shortly after closing time, and was drunk when he came there. The respondent was not himself present.

The justices found as a fact that the whole of the persons found on the premises were there as private guests, being entertained by the respondent's wife, and that the premises were in fact being used for the purpose of private premises, and not for the purpose of licensed premises.

It was contended on behalf of the appellant that, inasmuch as

(1) The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 13 : "If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence 10*l*., and not exceeding for the second and any subsequent offence 20*l*."

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men were found drunk on licensed premises, although during the time when such premises were closed according to law, and although they may have been there as private guests of the respondent and his wife, their mere presence on the premises in a state of drunkenness was evidence upon which the respondent should be convicted of permitting drunkenness contrary to the statute.

It was contended on behalf of the respondent that the mere fact that private guests of his own on the premises during the time such premises were closed according to law were drunk did not render him liable to conviction for permitting drunkenness.

In the absence of express authority to shew that the justices were entitled upon such facts as were admitted or found by them as hereinbefore set forth to convict the defendant of the offence charged, they dismissed the information and at the request of the appellant agreed to state this case.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to correct determinations and decisions in point of law, and, if not, what should be done in the premises.

Simey, for the appellant. For the purpose of the offence of permitting drunkenness on licensed premises under s. 13 of the Licensing Act, 1872, it is immaterial that the alleged offence took place at a time when the premises are by law required to be closed, nor does it make any difference that the drunken person is a guest and not a customer of the licensed person: *Reg.* v. *Pelly* (1); *Kessack* v. *Smith* (2); *Thompson* v. *McKenzie*. (3) Therefore, on the facts found by the justices, the respondent should have been convicted, as he did not prove, as required by s. 4 of the Licensing Act, 1902, that he took all reasonable steps for preventing drunkenness on his premises.

E. Shortt, for the respondent. Sect. 30 of the Licensing Act, 874, provides that it is not an offence for a licensed person to supply drink at his own expense to his private friends after

(1) [1897] 2 Q. B. 33. (2) (1905) 7 F. (J.C.) 75.
(3) [1908] 1 K. B. 905.

closing hours, and, inasmuch as it was decided in *Lester* v. *Torrens* (1) that a licensed person who was found drunk on his licensed premises after closing hours was not liable to the penalty imposed by s. 12 of the Act of 1872, it follows that the offence of permitting drunkenness on licensed premises is not committed if bona fide guests of the landlord are permitted to be drunk after closing hours. *Lester* v. *Torrens* (1) was approved of in *Reg.* v. *Pelly* (2), where the defendant had been convicted under s. 12 of having been found drunk on licensed premises, and the conviction was upheld, although the defendant was found drunk on the premises after closing hours, on the ground that the defendant was not a lodger or other person whose presence on the premises was not a contravention of the Act. In the present case the two men, being bona fide guests of the respondent, were lawfully on the premises after closing hours, and it was no more an offence to permit them to be drunk at that time than it would have been if the drunkenness had taken place on private premises. In the circumstances of this case the Court should follow *Lester* v. *Torrens* (1) rather than *Reg.* v. *Pelly* (2) and *Thompson* v. *McKenzie.* (3)

[LORD ALVERSTONE C.J. referred to *Redgate* v. *Haynes.* (4)]

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The admitted facts are that after closing hours the respondent's wife supplied drink, without charging for it, to a number of persons, and that two of the persons to whom drink had been thus supplied were subsequently found drunk on the licensed premises at 1 A.M. I attach no importance to the fact that one of these two persons had entered the licensed premises before closing time, and not as a guest, because the justices have found that all the persons who were supplied with drink after closing time were the guests of the respondent or his wife. The case therefore raises again the question whether in the case of offences dealt with under ss. 12 to 18 of the Licensing Act, 1872, the fact that the alleged offence was committed after closing hours is a material circumstance. *Reg.* v. *Pelly* (2) shews that

(1) (1877) 2 Q. B. D. 403.
(2) [1897] 2 Q. B. 33.
(3) [1908] 1 K. B. 905.
(4) (1876) 1 Q. B. D. 89.

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a person who is found drunk on licensed premises after closing hours may be convicted under s. 12, and we held in *Thompson* v. *McKenzie* (1) that premises do not cease to be licensed premises for the purpose of s. 13 merely because they are closed to the general public. Sects. 14 and 15 relate to disorderly houses, s. 16 to harbouring constables, and s. 17 to gaming, and s. 18 gives power to exclude drunken persons from licensed premises. In all these sections the statute is dealing with the locus in quo, and, in the interests of public order, prohibits certain things from being done, and for the purpose of these sections I can see no reason for drawing a distinction between the time when the sale of liquor is lawful and when it is prohibited. If it is an offence to allow a drunken person to enter licensed premises after closing hours it is equally an offence to permit drunkenness on the premises after closing hours. The Scotch case, *Kessack* v. *Smith* (2), is exactly in point, and supports the view which I have expressed.

For these reasons I think the justices ought on the facts found by them to have convicted the respondent.

BIGHAM J. I am of the same opinion. It is quite immaterial whether the two men who were found drunk on the respondent's premises were guests or not. They were in fact drunk on licensed premises, and therefore the respondent was prima facie guilty of the offence of permitting drunkenness on licensed premises, and no attempt was made under s. 4 of the Licensing Act, 1902, to shew that the respondent took any steps to prevent it.

WALTON J. I agree. I can see no distinction for the purpose of the argument in this case between ss. 13 and 17. Sect. 17 makes it an offence for a licensed person to suffer any gaming to be carried on on his premises; and in *Hare* v. *Osborne* (3) it was held that a licensed person who permitted his private friends to play cards for money on the licensed premises after closing hours was rightfully convicted under s. 17. It seems to me that that

(1) [1908] 1 K. B. 905. (2) 7 F. (J.C.) 75.
(3) (1876) 34 L. T. 294.

case is directly in point unless there is some distinction between the two sections, and I can find none.

Appeal allowed.

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LAWSON v. EDMINSON.

Solicitors for appellant: *Meredith, Roberts & Mills, for W. W. Moses, Sunderland.*

Solicitors for respondent: *A. B. Sanders, for Wm. Bell & Sons, Sunderland.*

F. O. R.

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By a contract in writing sellers sold to buyers 300 tons of rubber "fair quality Banjermassin Jelutong at 18*l.* 15*s.* per ton c.i.f. Liverpool . . . . for direct shipment from the East or Straits Settlements to Liverpool . . . ." The contract contained an arbitration clause in the following terms: "Any dispute on this contract to be settled by arbitration here in the usual way." On arrival at Liverpool the buyers refused to take delivery on the ground that the goods were not in accordance with the contract. The dispute was referred to arbitrators, who found that the goods were not in accordance with contract but must be accepted by the buyers at an allowance of 10*s.* per ton. The award was based upon the existence of an alleged custom applicable to contracts for raw material to be shipped to this country, to the effect that the buyers should accept the goods with an allowance for inferiority of quality, where that inferiority was in the opinion of the arbitrators not excessive or unreasonable. Upon a motion by the buyers to set aside the award, the Court directed an issue to determine the existence of the alleged custom, and upon the trial of the

ARBITRATION—*continued.*
issue the alleged custom was found not to exist :—

Held, that the arbitrators had no jurisdiction to deal conclusively with the question of the existence of the custom for the purpose of making their award, and that, as the custom upon which they based their award had been found not to exist in fact, the award compelling the buyers to accept goods not in accordance with the written contract was bad and must be set aside.

Hutcheson v. *Eaton*, (1884) 13 Q. B. D. 861, discussed and followed. *In re* NORTH WESTERN RUBBER COMPANY AND HÜTTENBACH & CO. **C. A. 907**

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A magistrate before whom criminal proceedings are being taken has power to make an order under s. 7 of the Bankers' Books Evidence Act, 1879, for the prosecutor to inspect and take copies of entries in the books of a bank at which the defendant keeps an account. THE KING *v.* KINGHORN - - - - - - **Div. Ct. 949**

BANKRUPTCY — *Bankruptcy Notice — County Court Judgment—Form of Notice—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 105—*County Court Rules*, 1903 *and* 1904, *Order* XXIII., *r.* 2; *Appendix, Form* 151 — *Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1883, 1890, *r.* 136 (1.); *Appendix, Form* 6.

BANKRUPTCY—*continued.*
Where a bankruptcy notice is founded on a county court judgment it must require payment of the judgment debt to the registrar of the county court in accordance with the terms of the judgment ; and a bankruptcy notice in the ordinary form requiring payment to the creditor is bad. The bankruptcy notice must also contain a statement of the address of the creditor. *In re* A DEBTOR, 484 OF 1908 - - - **C. A. 692**

2. —— *Bankruptcy Notice — Irregularity — Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice headed "Ex parte P. and S. trading as the H. Brick Company" required the debtor to pay to P., of &c., and S., of &c., giving their private addresses, 50*l.* odd, the balance due on a final judgment obtained by them against the debtor, unless (among other alternatives) he satisfied the Court that he had a counter-claim, set-off, or cross-demand against "the said P. and S. trading as the H. Brick Company" which equalled or exceeded the sum claimed by them and which could not have been set up in the action. The judgment was obtained by the creditors in their trading capacity :—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), that the notice was calculated to embarrass the debtor, inasmuch as it did not follow the terms of the judgment, and that it ought to be set aside.

Semble, per Kennedy L.J. : Where judgment has been obtained for a partnership debt by two persons trading as a firm, a proper form of bankruptcy notice would be "Pay to A. and B. trading as &c. or to either of them." *In re* A JUDGMENT DEBTOR, 530 OF 1908 - - **C. A. 474**

3. —— *Bankruptcy Notice — Validity—Mistake in Amount of Interest—Formal Defect—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*) ; *s.* 143, *sub-s.* 1.

A bankruptcy notice required payment of a certain sum as being the balance claimed to be due on a final judgment. In the margin of the notice there was a statement of how the balance was arrived at, namely, debt so much, interest so much, amount credited to debtor so much. It appeared that the interest was wrongly calculated and that the notice claimed 1*l.* 5*s.* 6*d.* in excess of the amount due from the debtor :—

Held, that the mistake in the amount of interest was not a formal defect or irregularity which could be remedied under s. 143 of the Bankruptcy Act, 1883, and that the bankruptcy notice was bad.

In re Bates, (1887) 4 Morr. 192, considered. *In re* A DEBTOR, 478 OF 1908 - - **C. A. 684**

4. —— *Distress for Rent—Lessee adjudicated Bankrupt the same Day—Judicial act — Commencement of Bankruptcy — Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 42, 43.

By virtue of s. 43 of the Bankruptcy Act, 1883, the bankruptcy of a debtor commences "at the time of the act of bankruptcy being committed on which a receiving order is made against him," that is to say, at the actual moment of the day when the act of bankruptcy is committed.

BANKRUPTCY—*continued.*

Where, therefore, a debtor presented his own petition at 12.50 P.M. on October 23, 1907, and consented to a receiving order and an immediate order of adjudication being made against him :—

Held, that his bankruptcy commenced at the moment of time, i.e., 12.50 P.M., when he presented his petition, notwithstanding that the order of adjudication, being a judicial act, would otherwise have operated from the earliest hour of that same day. *In re* BUMPUS. *Ex parte* WHITE - - - - - - **Bigham J. 330**

5. —— *Landlord and Tenant—Disclaimer of Lease of Plot of Land—Mortgage by Demise of Portions of Plot—Order vesting in Mortgagees whole Plot including Portion not mortgaged—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.

The lessee of a plot of land subject to a rent of 150*l.* a year mortgaged by sub-demise four portions of the plot to four different mortgagees by separate mortgages. He did not mortgage the remaining portion of the plot nor deal with it in any way. He subsequently became bankrupt, and his trustee in bankruptcy disclaimed the lease. The four mortgagees appointed a trustee of their interests under the mortgages, and he applied to a county court judge on their behalf for an order vesting in him as trustee for them all the rights, interest, and title of the bankrupt under the lease, including the portion of the plot not mortgaged, subject to the rent, covenants, and conditions contained in the lease. The county court judge made the order. The applicant was solvent, and no suggestion was made that he was not a proper person to be appointed trustee by the mortgagees :—

Held, that the vesting order was rightly made. IN RE HOLMES. EX PARTE ASHWORTH **Div. Ct. 812**

6. —— *Partnership — Breach of Trust — Director of Company and Member of Partnership —Misappropriation of Company's Assets—Proof in respect of distinct Contracts—Joint and several Contract—Joint and separate Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 18.

Where one member of a firm, being an express trustee, wrongfully concurs in a misappropriation by the firm of the trust fund, proof may be allowed against both the joint estate of the firm and the separate estate of the defaulting trustee ; and the fact that the trust fund properly came in the first instance into the hands of the firm for a specific purpose, which the firm omitted to fulfil, makes no difference in this respect ; neither does it make any difference that the trust was not express and that the member of the firm had not originally possession of the trust fund.

The same principle must also apply to every case in which there is a fiduciary relationship resting upon contract, such as that of a promoter, agent, or director of a company.

In re Parkers, (1887) 19 Q. B. D. 84, followed and approved. IN RE P. MACFADYEN. EX PARTE VIZIANAGARAM MINING COMPANY, LIMITED - - - - - - **C. A. 817**

BANKRUPTCY—*continued.*

7. —— *Post-nuptial Settlement—Purchaser for valuable Consideration—Refraining from Divorce Proceedings — "Purchaser" — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

In order to constitute a person a "purchaser" for valuable consideration within the exception mentioned in s. 47 of the Bankruptcy Act, 1883, it is not necessary that either money or physical property should be given ; the release of a right, or the compromise of a claim, may be sufficient to constitute a person a "purchaser" within the meaning of that section.

A post-nuptial settlement of his own property executed by a bankrupt within two years of his bankruptcy in favour of his wife and children, in consideration of the wife refraining from taking proceedings against him in the Divorce Court :—

Held by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. dissenting), to be within the exception mentioned in s. 47, and valid against the trustee in bankruptcy. *In re* POPE. *Ex parte* DICKSEE - - **C. A. 169**

—— Seizure of goods under credit agreement—Mutual dealings—Set-off - - **54**
See BILL OF SALE.

BANKRUPTCY RULES, 1883, 1890, r. 136 (4); APPENDIX, Form 6 - - - **692**
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BARRISTER—Revising barrister.
See under PARLIAMENT.

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BILL OF LADING—Inaccessibility of port of discharge on account of ice - - **385**
See SHIPPING. 1.

—— Limitation of shipowner's liability—Loss due to shipowner's negligence - **626**
See SHIPPING. 2.

BILL OF SALE—*Licence to take Possession—Carrier's Lien — Agreement giving Credit to Trader for Carriage of Goods subject to Preservation of Lien — Possession—Goods on Land in Tenancy of Owner—Seizure of Goods under Credit Agreement — Trespass — Bankruptcy — Mutual Dealings—Set-off—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

A railway company by a tenancy agreement terminable at a month's notice by either party let to a coal merchant certain land at a yearly rental for the purpose only of stacking coal unloaded from trucks on the company's railway sidings. The demised land adjoined the sidings and was within the company's railway yard, the gates of which were closed during the night. By an agreement, called a ledger agreement, between the company and the coal merchant, the company agreed to open in their ledger a monthly credit account with the coal merchant for the carriage of coal upon condition that they should have a continual lien upon all waggons

BILL OF SALE—*continued.*
and goods conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggons and goods to satisfy the lien ; and the company reserved the right to close the account upon giving one day's notice of their intention so to do. The account being in arrear, the company gave notice and closed the account and took possession of the coal in the trucks in the sidings and the coal on the demised land. The coal merchant was shortly afterwards adjudicated bankrupt. His trustee in bankruptcy brought an action against the company for trespass and for the value of the coal, which had been sold after the bankruptcy by consent of the parties, alleging that the ledger agreement was a bill of sale and void for non-registration. The company denied liability and claimed under s. 38 of the Bankruptcy Act, 1883, to set off a sum admittedly due to them by the bankrupt for the carriage of coal against any sum they might be held liable to pay in the action. Phillimore J., [1908] 1 K. B. 195, held (1.) that the ledger agreement was not a bill of sale and that the action failed ; (2.) that, assuming the trustee could have recovered, the company would have had no right of set-off. The trustee appealed so far as the decision related to the coal on the demised land, and the company lodged a cross-notice of appeal as to set-off :—

Held, (1.) by Cozens-Hardy M.R. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the coal on the demised land was at the date of seizure in the possession of the bankrupt, and that the company's common law lien for carriage had ceased, and consequently that the ledger agreement qua that coal was a bill of sale, being either a licence to take possession or an agreement conferring a right in equity to the coal or a charge or security thereon ; (2.) that at the date of the receiving order the right of the bankrupt was a right to a return of the coal and the right of the company was a right to money, and that these two claims could not be set off under s. 38 of the Bankruptcy Act, 1883. TRUSTEE OF LORD *v.* GREAT EASTERN RAILWAY COMPANY
C. A. 54

BOOKS—Banker—Order for inspection of books—Jurisdiction of magistrate—Bankers' Books Evidence Act - - - **949**
See BANKER.

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See under CONTRACT.

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See under TRUSTEE.

BREACH OF WARRANTY—Contraband of war
See INSURANCE (MARINE). **504**

BREAD—*Sale otherwise than by Weight—Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 4.

Although it is not necessary in order to constitute a sale of bread by weight within the meaning of s. 4 of the Bread Act, 1836, that the bread should be weighed at the very instant of sale, it must be weighed at a time before and with reference to the sale.

The respondent weighed a loaf which then weighed 2 lbs., but placed the loaf aside for consumption in his own household. Twelve hours later the loaf was, by mistake, sold by the respondent's brother-in-law, acting on his behalf. At the time of the sale the loaf was not weighed, and in fact was 1½ ozs. under 2 lbs., the loss in weight being due to evaporation which had taken place since it was weighed twelve hours previously :—

Held, that the loaf had not been sold by weight within the meaning of s. 4 of the Bread Act, 1836, inasmuch as there had been no weighing with reference to the sale, and that the respondent had therefore committed an offence under the section.

Cox v. *Bleines*, [1902] 1 K. B. 670, explained.
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—— *Baker* v. *Snell* - [1908] 2 K. B. 352
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—— *Bank of England* v. *Cutler*, [1907] 1 K. B. 889.
Affirmed by C. A. **[1908] 2 K. B. 208**
—— *Barrow* v. *Myers*, (1888) 4 Times L. R. 441 ; 52 J. P. 345.
Overruled by C. A. CROZIER, STEPHENS & Co. *v.* AUERBACH
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—— *Bates, In re* - (1887) 4 Morr. 192
Considered by C. A. IN RE A DEBTOR
[1908] 2 K. B. 684

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—— *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.*, [1908] 1 K. B. 796.
Affirmed by C. A. - **[1908] 2 K. B. 626**

—— *Beckley* v. *Scott & Co.* [1902] 2 I. R. 504
Decision of the majority of the Court in, disapproved by C. A. CRIBB *v.* KYNOCH (No. 2), LIMITED.
[1908] 2 K. B. 551

—— *Brintons, Ld.* v. *Turvey* - [1905] A. C. 230
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—— *Brook* v. *Meltham Urban Council*, [1908] 2 K. B. 341.
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—— *Cobbett* v. *Wood* - [1908] 1 K. B. 590
Reversed by C. A. - **[1908] 2 K. B. 420**

—— *Cox* v. *Bleines* - - [1902] 1 K. B. 670
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—— *Finch* v. *Bannister* - [1908] 1 K. B. 485
Affirmed by C. A. - **[1908] 2 K. B. 441**

—— *Fletcher* v. *Ryland*, (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
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—— *Gramophone and Typewriter, Ld.* v. *Stanley*, [1906] 2 K. B. 856.
Affirmed by C. A. - **[1908] 2 K. B. 89**

—— *Guthrie & Co.* v. *Brechin Magistrates*, (1888) 15 R. 385.
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[1908] 2 K. B. 780

—— *Hughes* v. *Justin* - [1894] 1 Q. B. 667
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—— *Hutcheson* v. *Eaton* - (1884) 13 Q. B. D. 861
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[1908] 2 K. B. 907

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[1908] 2 K. B. 863

—— *Johnson* v. *Kearley* - [1908] 2 K. B. 82
Affirmed by C. A. - **[1908] 2 K. B. 514**

—— *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625.
Discussed by C. A. LIVERPOOL CORPORATION *v.* WEST DERBY ASSESSMENT COMMITTEE - - **[1908] 2 K. B. 647**

—— *Liverpool Corporation* v. *Peter Walker & Son, Ld.*, [1908] 1 K. B. 28.
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—— *North Staffordshire Colliery Owners' Association* v. *North Staffordshire Ry. Co., London and North Western Ry. Co., Great Western Ry. Co., and Shropshire Union Railways and Canal Co.*, [1908] 1 K. B. 771.
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—— *Owen & Co.* v. *Cronk* - [1895] 1 Q. B. 265
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—— *Parkers, In re* - (1887) 19 Q. B. D. 84
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—— *Reg.* v. *Russell* (*Lord John*), (1839) 7 Dow, 693.
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[1908] 2 K. B. 333

—— *Rimmer* v. *Webster* - [1902] 2 Ch. 163
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—— *Rouse* v. *Dixon* - - [1904] 2 K. B. 628
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—— *Rugby Portland Cement Co.* v. *London and North Western Ry. Co.*, [1908] 1 K. B. 925.
Reversed by C. A. - **[1908] 2 K. B. 606**

—— *Svensden* v. *Wallace*, (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404.
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—— *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Co.*, [1908] 1 K. B. 910.
Affirmed by C. A. - [1908] 2 K. B. 504

—— *Yorkshire Provident Life Assurance Co.* v. *Gilbert*, [1895] 2 Q. B. 148.
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COUNTY COURT—*Execution—Equitable Interest in Land—Appointment of Receiver—Practice—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89.
Under s. 89 of the Judicature Act, 1873, a county court has power to appoint a receiver by way of execution against equitable interests in land. THE KING *v.* SELFE - Div. Ct. 121

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2. —— *Execution—Warrant sent to Foreign Court—Binding the Property in Goods of Execution Debtor—Time—Practice—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 158—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 26.

Where a warrant of execution against the goods of a judgment debtor has been issued out of a county court and is sent by the high bailiff of that court under s. 158 of the County Courts Act, 1888, to the registrar of another county court for execution against the goods of the judgment debtor then within the jurisdiction of that other court, the time from which the writ of execution binds the property in those goods of the judgment debtor under s. 26 of the Sale of Goods Act, 1893, is the time at which the warrant of execution is issued by the registrar of that other court to the high bailiff of that court. BIRSTALL CANDLE COMPANY *v.* DANIELS; SAUNDERS, CLAIMANT - - **Div. Ct. 254**

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CRIMINAL LAW—*Appeal—Conviction involving "no substantial Miscarriage of Justice," Meaning of—Power of Court to find Facts—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

On the trial of an indictment for manslaughter there was evidence that the prisoner had inflicted injuries upon the deceased more than a year and a day before the date of the death, and also certain further injuries within that period which tended to accelerate the death. The judge directed the jury that they might find the prisoner guilty even if they thought that the death was wholly caused by the earlier injuries. The jury convicted the prisoner.

By s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, "The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Upon an appeal against the conviction on the ground of misdirection:—

Held that, although upon a proper direction the jury would probably have found that the later injuries accelerated the death, as it was not certain that they would have done so, and as the Court were not entitled under the above section to substitute themselves for the jury and find the facts necessary for conviction, they could not say that there had been no substantial miscarriage of justice, so as to entitle them to dismiss the appeal upon that ground. THE KING *v.* DYSON **C. C. A. 454**

CRIMINAL LAW—*continued.*

2. —— *Appeal—Evidence of Accomplice—Absence of Corroboration—Omission of Judge to caution Jury—Effect of on Conviction.*

Where a prisoner is convicted upon the uncorroborated evidence of an accomplice the Court of Criminal Appeal may quash the conviction if the judge at the trial omitted to caution the jury against convicting upon such evidence. THE KING *v.* TATE - - - - **C. C. A. 680**

3. —— *Appeal — Order for Restitution of Stolen Property—Appeal by Person against whom Order made—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 6, *sub-s.* 2; *Criminal Appeal Rules*, 1908, *r.* 9.

Where upon a conviction an order for the restitution of stolen property has been made by the Court of trial, although, upon an appeal by the convicted person to the Court of Criminal Appeal, the person against whom the order of restitution has been made has, in the event of that Court proposing of its own motion to annul or vary that order, a right to be heard under r. 9 of the Criminal Appeal Rules, 1908, he has no right himself to initiate an appeal against the order. THE KING *v.* ELLIOTT - **C. C. A. 452**

4. —— *Cruelty to Children — Custody of Child—Parent living apart from Wife—Wilful Neglect of Child in Manner likely to cause unnecessary Suffering or Injury to Health—Omission of Parent to send any Part of Earnings for Support of Child—Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 1, *sub-s.* 1.

A parent cannot, by leaving his wife and living apart from her, divest himself of the custody of his child so as to free himself from liability to conviction for an offence under s. 1 of the Prevention of Cruelty to Children Act, 1904; and if so while living apart from his wife he wilfully neglects his child in a manner likely to cause it unnecessary suffering or injury to its health, he will be guilty of a misdemeanour under the section.

The mere omission of the parent to pay any part of his earnings towards the support of his child may constitute wilful neglect within the meaning of the section. THE KING *v.* CONNOR **C. C. R. 26**

5. —— *Indictment—Amendment of Count—Substitution of Allegation of Fraud for False Pretences—Criminal Procedure Act*, 1851 (14 & 15 *Vict. c.* 100), *s.* 1—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13, *sub-s.* 1.

There is no power to amend an indictment containing a count which charges the prisoner, under s. 13, sub-s. 1, of the Debtors Act, 1869, that in incurring a debt he obtained credit by false pretences, by striking out the allegations of false pretences from the count, and inserting therein an allegation that the prisoner incurred the debt by means of fraud. THE KING *v.* BENSON - - - - - **C. C. R. 270**

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—— Judgment debt—Order for payment by instalments—Execution—Necessity for leave - - - - - - **899**
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DEBTORS ACT — Indictment — Amendment of count — Substitution of allegation of fraud for false pretences - - **270**
See CRIMINAL LAW. 5.

—— Judgment debt — Order for payment by instalments—Execution—Necessity for leave - - - - - - **899**
See PRACTICE. 4.

DEFAMATION—*Libel—Personal Imputation—Plea of Fair Comment—Meaning and Effect of—Misdirection—New Trial.*

In an action for libel based upon articles published in the defendants' newspaper the plaintiff alleged that the articles imputed to him improper conduct in the discharge of his duties as deputy returning officer at a municipal election. The defendants pleaded justification and fair comment. At the trial the judge directed the jury that if they found the statements in the articles to be libellous and the facts truly stated, then the question for them would be whether the comment was bona fide and fair, or whether it tended, as alleged, to charge the plaintiff with improper conduct. No separate questions were left to the jury, and they returned a general verdict for the plaintiff with damages. Upon an application for a new trial :—

Held by the Court of Appeal, that the question of fair comment had not been properly left to the jury as a separate issue, and

DEFAMATION—*continued.*

that there must be a new trial on the ground of misdirection.

Dakhyl v. *Labouchere*, H. L. (E.), [1908] 2 K. B. 325, n., applied. HUNT *v.* STAR NEWSPAPER COMPANY, LIMITED - - **C. A. 309**

2. —— *Libel—Personal Imputation—Plea of Fair Comment—New Trial.*

Appeal from a decision of the Court of Appeal, setting aside a verdict and judgment for 1000*l.* in favour of the appellant (the plaintiff in the action) and ordering a new trial.

The appellant was a doctor of medicine, a bachelor of science, and a bachelor of arts in the University of Paris; and he had since August, 1902, practised as a doctor in Kensington, specializing in the treatment of diseases of the ear, nose, and throat.

The respondent was the editor and proprietor of the newspaper called *Truth*. In the issue of that paper dated April 2, 1903, he had published the following paragraph relating to the appellant :—

"Sundry inquiries have reached me during the last week or two respecting one Dr. H. N. Dakhyl, of 178, Holland Road, Kensington, who appends to his name the symbols 'B.Sc., B.A., M.D., Paris, &c.,' and describes himself as 'a specialist for the treatment of deafness, ear, nose, and throat diseases.' Possibly this gentleman may possess all the talents which his alleged foreign degrees denote, but, of course, he is not a qualified medical practitioner, and he happens to be the late 'physician' to the notorious Drouet Institution for the Deaf. In other words, he is a quack of the rankest species. I presume that he has left the Drouet gang in order to carry on a 'practice' of the same class on his own account, and probably he is well qualified to succeed in that peculiar line."

Appeal dismissed and judgment of Court of Appeal affirmed. DAKHYL *v.* LABOUCHERE, (March 14, 1907), H. L. (E.)
[1908] **2 K. B. 325, n.**

—— Discovery—Libel — Justification—Particulars of justification—Allegations of misconduct — Inspection of plaintiffs' books - - - - - **151**
See PRACTICE. 2.

DIRECTOR—Company.
See under COMPANY.

"DISBURSEMENTS" — Solicitor — Counsel's fees—Fees not paid before delivery of bill—Taxation - - - - **510**
See SOLICITOR. 1.

DISCLAIMER—Trustee in bankruptcy — Order vesting in mortgagees whole plot of land including portion of plot not mortgaged - - - - - - **812**
See BANKRUPTCY. 5.

DISCOVERY—Libel—Justification — Particulars —Allegations of misconduct — Inspection of plaintiffs' books - - **151**
See PRACTICE. 2.

DISCOVERY—*continued.*
—— Order for discovery—Refusal of one co-plaintiff to obey—Attachment - **579**
See PRACTICE. 1.

DISEASE—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

DISSOLUTION—Poor law—Dissolution of union—Consent of guardians - - **368**
See LOCAL GOVERNMENT.

DISTRESS — *Exempted Goods — Implements of Trade—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

A commercial traveller, who was employed to sell typewriting machines on commission, was entrusted by his employers with one of their machines as a sample. While in his possession the machine was distrained by his landlord for rent due by him.

Held, that it was not an implement of his trade, and was not protected as such from distress by virtue of s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888. ADDISON *v.* SHEPHERD **Div. Ct. 118**

—— Rent, Distress for — Lessee adjudicated bankrupt the same day—Judical act
See BANKRUPTCY. 4. **330**

DIVIDED PARISHES AND POOR LAW ACT, 1876 - - - - - - **368**
See LOCAL GOVERNMENT.

DIVORCE— *Costs—Practice—Order for Payment of Costs of Divorce Proceedings—Mode of enforcing Order—Action in King's Bench Division—Jurisdiction—Rules of Supreme Court, Order XLII., r.* 24—*Order LXVIII., r.* 1.

An action in the King's Bench Division will not lie to recover a sum payable for costs under an order of the Divorce Court, but such order can only be enforced by the methods prescribed by the Divorce Rules and Regulations. IVIMEY *v.* IVIMEY - - - - - - - **C. A. 260**

—— Post-nuptial settlement — Purchaser for valuable consideration — Refraining from divorce proceedings - - **169**
See BANKRUPTCY. 7.

DOCKS—Dock company—Exemption from dock rates—Lighter—Ship or vessel "lying therein" - - - - - **175**
See SHIPPING. 3.

DOG—*Savage Dog—Personal Injury—Liability of Owner—Scienter—Intervening Act of Third Person—Remoteness of Damage—Master and Servant—Scope of Employment.*

The owner of a dog known by him to be savage entrusted it to the care of a servant, who incited it to attack the plaintiff, and thereupon the dog bit the plaintiff, who brought an action against the owner in the county court for damages. The county court judge having nonsuited the plaintiff :—

Held, that the action must go down for a new trial on the ground that the question whether

DOG—*continued.*
the servant was acting within the scope of his employment ought to have been left to the jury, and by Cozens-Hardy M.R. and Farwell L.J. (Kennedy L.J. dissenting) on the further ground that a person keeping an animal feræ naturæ, or an animal mansuetæ naturæ which is known to him to be savage, is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person.

Decision of Divisional Court, [1908] 2 K. B. 352, affirmed. BAKER *v.* SNELL - **C. A. 825**

—— "Canine specialist"—Veterinary Surgeons Act—Qualified person - - - **248**
See VETERINARY SURGEON.

DRAINAGE—Land drainage.
See under LAND DRAINAGE.

DRAINS.
See under SEWERS.

DRUNKENNESS — Permitting — Guest after closing hours - - - - **952**
See LICENSING ACTS. 3.

DUTY—Estate duty.
See under REVENUE.

EMPLOYER AND WORKMAN — *Compensation — Charwoman — Casual Employment — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a charwoman, who had been employed by the respondents on Fridays and alternate Tuesdays for a considerable period, met with an accident while working for them on one of the stated days. She came regularly to the respondents on those days without any special instructions. Upon an application for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the applicant was in the regular, and not casual, employment of the respondents, and made an award in her favour :—

Held, that it was not competent to the Court to interfere with this finding, there being ample evidence to support it. DEWHURST *v.* MATHER - - - - - - **C. A. 754**

2. —— *Compensation—Damages — Remedies against both Employer and Stranger—"Circumstances creating a Legal Liability"—"Proceedings"—"Recover" Compensation—Payments by Person other than the Employer — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6, *sub-s.* 1.

"Circumstances creating a legal liability" in s. 6 of the Workmen's Compensation Act, 1906, mean, not merely circumstances which in fact create a legal liability, but circumstances which are alleged to create a legal liability, which would be the foundation of an action for negligence.

The meaning of "proceedings" in s. 6, sub-s. 1, is not to be confined to legal proceedings actually taken, but is satisfied if a claim is made against some person other than the employer for negligence.

EMPLOYER AND WORKMAN—*continued.*

To "recover" compensation does not necessarily mean to recover by means of legal proceedings: it is sufficient if the workman has claimed compensation and received it.

A workman who had been injured in the course of his employment made a claim for compensation against a person other than his employer whom he alleged to be under liability for negligence, and received various payments in satisfaction of his claim without having resort to legal proceedings, though legal liability was not admitted:—

Held, that the workman was precluded by s. 6, sub-s. 1, from obtaining compensation from his employer under the Workmen's Compensation Act, 1906. PAGE *v.* BURTWELL - **C. A. 758**

3. —— *Compensation — Evidence — Accident arising out of and in course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A donkeyman, whilst returning on board his employers' ship from the shore, fell off the gangway and struck an iron girder and was killed. His widow applied for compensation under the Workmen's Compensation Act, 1906, but adduced no evidence as to the purpose for which the deceased went on shore:—

Held, that the applicant had failed to prove that the accident arose out of and in the course of the deceased's employment. MCDONALD *v.* OWNERS OF STEAMSHIP BANANA - **C. A. 926**

4. —— *Compensation — Infant Workman — Accident causing Personal Injury—Notice—Unsuccessful Action against Employer—"Option"—Subsequent Claim for Compensation under the Act—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1, *sub-ss.* 2 (*b*), 4; *s.* 2, *sub-s.* 1.

The "option" given to a workman by the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (*b*), either to claim compensation under the Act or take other proceedings cannot be confined to an option binding only in the case of success.

The procedure prescribed by s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, must be strictly followed, and that sub-section has no application except when proceedings based on the common law liability of the employer have been commenced within six months from the occurrence of the accident.

A workman cannot give the notice required by s. 2, sub-s. 1, as a foundation for future proceedings under the Act, in the event of a common law action commenced after the expiration of six months from the occurrence of the accident being unsuccessful.

A workman, under age, who had been injured by an accident arising out of and in the course of the employment, gave notice of the accident and of a claim for compensation within the prescribed time, but took no further proceedings under the Act; thirteen months after the accident, an unsuccessful action to recover damages against the employers was brought. After the dismissal of this action, an application was made to the county court judge, pursuant to the aforesaid notice, for compensation under the Workmen's Compensation Acts:—

EMPLOYER AND WORKMAN—*continued.*

Held, on the construction of s. 1, sub-ss. 2 (*b*) and 4, read together, that this application for compensation could not now be entertained.

Edwards v. *Godfrey*, [1899] 2 Q. B. 333, applied.

Rouse v. *Dixon*, [1904] 2 K. B. 628, discussed and explained.

Decision of the majority of the Court in *Beckley* v. *Scott & Co.*, [1902] 2 I. R. 504, disapproved. CRIBB *v.* KYNOCH, LIMITED (No. 2) **C. A. 551**

5. —— *Compensation—"Lead Poisoning or its sequelæ"—Proximate or ultimate cause of Death—Death caused by Industrial Disease—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-ss.* 1 *and* 2; *Sched. III.*

In order to bring the case of a deceased workman within the operation of s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, which section applies the Act to industrial diseases, it must be established that a disease mentioned in the Third Schedule to the Act was either the proximate or ultimate cause of his death. It is not sufficient that the death was caused by a complaint which might in some cases be a sequela of the disease but might also be a sequela of something else. It must be proved that the death was at least a remote consequence of the disease in the case of the particular individual.

Sub-s. 2 of the section has no effect until the case has been brought within the operation of sub-s. 1. HAYLETT *v.* VIGOR & CO. **C. A. 837**

6. —— *Compensation — Seaman — Rate of Remuneration — Average Weekly Earnings — Board and Lodging in addition to Cash Wages — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (2.) (*a*).

On a claim for compensation under the Workmen's Compensation Act, 1906, by a seaman who received a weekly sum in cash and his board and lodging on the ship:—

Held that, having regard to the circumstances under which an ordinary seaman is necessarily engaged and paid, there is no other practicable test for computing the value to him of the board and lodging provided by the employer than (in the absence of special circumstances) the actual cost of these allowances to the shipowner. ROSENQVIST *v.* BOWRING & CO., LIMITED **C. A. 108**

7. —— *Compensation—Sewer Gas—Enteritis—Injury by Accident — Disease — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman contracted enteritis from inhaling sewer gas in the course of his employment:—

Held, that this was not a case of "injury by accident" within the meaning of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1.

The decision in *Brintons, Ld.* v. *Turvey*, [1905] A. C. 230, is not to be taken as involving the doctrine that all diseases contracted by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Acts. BRODERICK *v.* LONDON COUNTY COUNCIL. **C. A. 807**

EMPLOYER AND WORKMAN—*continued.*

8. —— *Compensation—Sub-contractor, Workman employed by—Liability of Principal—Accident "on or in or about Premises"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1, 4.

A workman who was employed in connection with certain paving operations by a sub-contractor, his duties being to cart materials for the work and remove rubbish, while so engaged was accidentally killed in the public street at a distance of two miles from the site of the work:—

Held, that the accident had not occurred "on, or in, or about premises" on which the principal contractor had undertaken to execute the work, or which were "otherwise under his control or management" within s. 4, sub-s. 4, of the Workmen's Compensation Act, 1906, and that consequently the principal was not liable to pay compensation under the Act. ANDREWS *v.* ANDREWS AND MEARS - - - C. A. 567

9. —— *Compensation—Tortious Act of Fellow-workman—Act having no Relation to the Employment—Accident arising "out of and in the course of" the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

An employer is not liable under the Workmen's Compensation Act, 1906, to pay compensation for injury caused to a workman while engaged at his work by the tortious act of a fellow-workman which had no relation to the employment.

Armitage v. *Lancashire and Yorkshire Ry. Co.*, [1902] 2 K. B. 178, followed and approved.

Per Buckley L.J.: The words "out of and in the course of the employment" in s. 1, sub-s. 1, of the Act are used conjunctively, and are not to be used as meaning out of—that is to say, in the course of. The words "out of" point to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place. FITZGERALD *v.* W. G. CLARKE & SON C. A. 796

10. —— *Compensation—"Workman"—Person whose Employment is "of a Casual Nature"—Window Cleaner—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A man who earned his living by doing odd jobs was employed by the occupier of a private house to clean his windows. He had been so employed at irregular intervals of about six weeks during a period of two years. He was usually sent for when the windows required cleaning, and when he came was paid 6*s.* 6*d.* a day for his work. There was no agreement between the parties of either permanent or periodic employment. While so employed the man met with his death through an accident:—

Held, that the employment was "of a casual nature"; that the deceased was therefore not a "workman" within s. 13 of the Workmen's Compensation Act; and consequently that the employer was not liable to pay compensation under the Act. HILL *v.* BEGG - - C. A. 802

—— Dog—Savage dog—Liability of owner—Intervening act of third person—Scope of employment - - - - 825
See DOG.

EMPLOYER AND WORKMAN—*continued.*

—— Member of union—Debt due to union—Interference with employment—Threatening employers—"Trade dispute" - - - - - 844
See TRADE UNION.

ENTERITIS—Workmen's compensation—Injury by accident—Sewer gas - - 807
See EMPLOYER AND WORKMAN. 7.

EQUITABLE INTEREST—In land—Practice—Execution—Appointment of receiver
See COUNTY COURT. 1. 121

ESTATE DUTY.
See under REVENUE.

ESTOPPEL—Ship—Registered owner holding as trustee—Priorities—Principal and agent—Negligence - - - - 484
See TRUSTEE.

—— Transfer of stock—Personation of holder—Estoppel—Objection of Bank to replace stock - - - - - - - 208
See INDIA STOCK.

EVIDENCE—*Negligence—Negligent Course of Conduct—Dangerous Practice—Single Act or Omission—Evidence of similar Acts or Omissions—Admissibility.*

The plaintiff in an action of negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber, in using razors and other appliances in a dirty and insanitary condition. In support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop:—

Held that, as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of these witnesses was admissible. HALES *v.* KERR - - - - - - Div. Ct. 601

—— Banker—Order for inspection of books—Jurisdiction of magistrate—Bankers' Books Evidence Act - - - 949
See BANKER.

—— Court of Criminal Appeal—Evidence of accomplice—Absence of corroboration—Omission of judge to caution jury—Effect of on conviction - - 680
See CRIMINAL LAW. 2.

—— Franchise—Objection—Prima facie proof of ground of objection—Rebutting evidence—Evidence of repute - - 933
See PARLIAMENT.

—— Infant—Necessaries—Actual requirements—Onus of proof - - - 1
See INFANT.

—— Street—Sewer—Satisfaction of urban authority - - - - - - 671
See STREETS.

—— Workmen's compensation—Accident.
See under EMPLOYER AND WORKMAN.

EXECUTION—Necessity for leave—Judgment debt—Order for payment by instalments - - - - - - - **899**
See PRACTICE. 4.

—— Receiver, Appointment of — Equitable interest in land—Practice - - **121**
See COUNTY COURT. 1.

—— Warrant sent to foreign Court—Binding the property in goods of execution debtor—Time - - - - **254**
See COUNTY COURT. 2.

EXTRADITION—Sealed packet containing formula—Deposit in bank—Obligation of banker to produce and deliver up **333**
See SUBPŒNA DUCES TECUM.

FACTORY—*Fencing of Machinery, Absence of—Person suffering bodily Injury—Offence—Limitation of Time for laying Information—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 135, 136, 146.

Sect. 10 of the Factory and Workshop Act, 1901, provides that a factory in which there is a contravention of the provisions of that section with regard to the fencing of machinery "shall be deemed not to be kept in conformity with" the Act, and by s. 135, if a factory is not kept in conformity with the Act, the occupier thereof shall be liable to a fine. By s. 136, if any person suffers any bodily injury in consequence of the occupier of a factory "having neglected to observe any provision" of the Act, the occupier shall be liable to a fine. Sect. 146 provides that the information for an offence under the Act shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed.

On January 21 the fact that certain machinery at the defendants' factory was unfenced, in contravention of s. 10, came to the knowledge of the inspector of the district. On July 31, in consequence of the machinery still being unfenced, a person suffered bodily injury. On October 24 an information was laid charging that, on July 31, the defendants' factory was not kept in conformity with the Act, whereby a person suffered bodily injury.

The magistrate dismissed the information on the ground that it was out of time, inasmuch as it had not been laid within three months of January 21 :—

Held, that ss. 135 and 136 create separate and distinct offences; that the offence with which the defendants were charged was the offence under s. 136; and that, that offence having been committed on July 31, the information had been laid in time. THE KING *v.* TAYLOR - - - - - - **Div. Ct. 237**

FAIR COMMENT—Plea of—Meaning and effect of—Misdirection—New trial—Libel
See DEFAMATION. 1. **309**

FALSE PRETENCES—Substitution of allegation of fraud for—Indictment—Debtors Act
See CRIMINAL LAW. 5. - **270**

FENCING—Machinery—Factory—Limitation of time for laying information - - **237**
See FACTORY.

FINANCE ACTS.
See under REVENUE.

FLATS — *Negligence — Dangerous Premises — Building let out in Flats—Staircase in Possession of Landlord—Staircase not Lighted—Landlord, Liability of, to Persons other than Tenants —Absence of any Undertaking to light Staircase.*

The defendant was the owner of a building, the different floors of which were let by him as separate offices to different tenants, the staircase by which access to them was obtained not being let, but remaining in the legal possession of the defendant. The agreements for the letting of the offices respectively contained no provision with regard to the lighting of the staircase. The tenants respectively had gas lights on the landings outside the entrances to their respective offices, which were supplied with gas from their own meters, and the practice was that each tenant on leaving his office for the night turned off his own light, but it did not appear that there was any agreement between the defendant and the tenants that they should light the staircase. The plaintiff, who was in the employ of one of the tenants, upon coming down the staircase from his employer's offices on an evening in March at 8.15, when, all the lights having been put out, the staircase was in darkness, failed to find his way out through the street door into the street, and, going further down the stairs towards the basement, fell through a door opening upon a flagged courtyard at some distance above the level of the flagstones. This door was used for hoisting goods into and out of the building. In an action brought by the plaintiff against the defendant in respect of injuries resulting from the fall :—

Held, that there was no duty towards the plaintiff imposed upon the defendant to light the staircase, and consequently the action was not maintainable.

Miller v. *Hancock*, [1893] 2 Q. B. 177, discussed and distinguished. HUGGETT *v.* MIERS **C. A. 278**

FOREIGN COMPANY—Shares held in—Income tax—Company resident in the United Kingdom—Control - - - **89**
See REVENUE. 2.

FORFEITURE—Relief from — Lease — Conditional order — Non-fulfilment of conditions - - - - - - **114**
See LEASE.

FRANCHISE.
See under PARLIAMENT.

FRAUD—Indictment—Substitution of allegation of fraud for false pretences—Amendment of count—Debtors Act - **270**
See CRIMINAL LAW. 5.

—— Insurance (Life) — Non-disclosure of material facts—Absence of fraud - **863**
See INSURANCE (LIFE).

FRAUDS, STATUTE OF — Acknowledgment—Part payment by cheque — Implied promise to pay balance of debt—Date when promise implied - - - **584**
See LIMITATIONS, STATUTE OF.

FRIENDLY SOCIETY — *Dispute — Arbitration under Rules—Order to pay Costs—Jurisdiction —Ultra vires—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 68.

By s. 68, sub-s. 1, of the Friendly Societies Act, 1896, "Every dispute between (*a*) a member or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

A registered friendly society made certain rules, one of which was that the decision of every arbitration and appeal committee should be binding immediately after it had been given by the committee, unless otherwise ordered, and any member, court, or district refusing to comply should be suspended from the order; another rule provided that the arbitration committee might order either party to pay costs. The plaintiff and his son were both members of the society, and the plaintiff's son, having become a lunatic, was removed to an asylum, where the plaintiff paid for his maintenance. The plaintiff, acting in form on behalf of his son, but in fact with the object of recouping himself the cost of his son's maintenance, claimed his son's sick pay, which, after the dispute had been heard by the domestic tribunals under the rules, was awarded from a certain date. The plaintiff claimed that it ought to commence from an earlier date, and this dispute also was referred under the rules to an arbitration committee of the society, which decided against the plaintiff and ordered him to pay the costs. The plaintiff declined to pay the costs, and, having been suspended under the above rule, brought an action for an injunction to restrain the society from suspending him and for damages for wrongful exclusion from the society:—

Held, that the rule providing for suspension was not ultra vires as being in contravention of s. 68 of the Friendly Societies Act, 1896, because, even assuming that exclusion under that rule was a proceeding to enforce compliance with the decision of the arbitration committee, the provisions of s. 68 did not forbid the enforcement of the decisions of domestic tribunals by other means than legal process, but merely prevented applications for enforcement from being made to any Court of law other than a county court.

Held, further, that the plaintiff's claim against the society for the sick pay was brought by him in his capacity of a member, against whom an order for costs could properly be made; and that, even if the claim was in strictness a claim on behalf of his son, the plaintiff was a "party" to the proceedings before the arbitration committee within the meaning of the rules, and was, as such, liable to have an order for costs made against him. CATT *v.* WOOD **C. A. 458**

GAMING—*Cause of Action—Cheque given for Racing Bets—Forbearance to publish Default—New Consideration—Gaming Act*, 1710 (9 *Anne, c.* 14); *Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1; *Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Amendment of Pleadings at Trial.*

The plaintiff and defendant, who were both bookmakers, had betting transactions together, which resulted in the defendant giving the plaintiff a cheque for the amount of bets lost to him. At the request of the defendant the cheque was held over by the plaintiff for a time, and part of the amount of the cheque was paid by the defendant. Subsequently a fresh verbal agreement was come to between the parties, by which, in consideration of the plaintiff holding over the cheque for a further time and refraining from declaring the defendant a defaulter and thereby injuring him with his customers, the defendant promised to pay the balance owing in a few days. The balance was never paid:—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constituted a good consideration for the fresh agreement, and that the plaintiff was entitled to recover.

The writ in the action was indorsed with a statement of claim upon an account stated, but at the trial the plaintiff set up, and recovered upon, the fresh agreement; no formal amendment of the statement of claim was made at the trial, but all necessary amendments were taken as having been made:—

Held, that in all cases where the plaintiff seeks to recover at the trial upon a different cause of action from that appearing in the pleadings, a formal amendment of the pleadings should be made by the judge. HYAMS *v.* STUART KING - - - - - **C. A. 696**

GARNISHEE — Trial of garnishee issue by Master — Appeal from decision of Master - - - - - **548**
See PRACTICE. 5.

GAS—Workmen's compensation—Sewer gas—Enteritis—Injury by accident - **807**
See EMPLOYER AND WORKMAN. 7.

GENERAL AVERAGE—Injury to ship—Damage to cargo — Practice of average adjusters - - - - - - - **298**
See SHIPPING. 4.

GOODS—Sale of.
See under SALE OF GOODS.

GUARDIANS OF THE POOR. *See* under POOR LAW.

HIGHWAY—Tramway company.
See under TRAMWAYS.

HIGHWAY—*continued.*
— Water company—Liability to reinstate pavement—Subsidence — Omission of road authority to rectify - - - **594**
See WATER COMPANY.

HUSBAND AND WIFE — Costs — Judicial separation, petition by wife for—Bill of costs—Insufficiency - - - **420**
See SOLICITOR. 2.

INCOME TAX—Public revenue.
See under REVENUE.

INDEMNITY—Stock Exchange—Principal and agent—Right of broker to indemnity from client - - - - - **82**
See STOCK EXCHANGE.

—— Transfer of stock—Personation of holder—Obligation of Bank to replace stock
See INDIA STOCK. **208**

INDIA STOCK—*Transfer of Stock—Personation of Holder—Identification of Transferor by Stockbroker—Effect of Transfer—Estoppel—Request to Bank to perform ministerial Duty—Liability to indemnify—Obligation of Bank to replace Stock.*

Under the statutes authorizing the issue of India stock, transfers of that stock are invalid unless they are entered and registered in a book kept at the Bank of England, and are signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party claiming to transfer India stock is the person entitled to it, it is the custom of the Bank to keep a list of stockbrokers whose identification of intending transferors will be accepted by them. The Bank will also accept identifications made by some of their own officials, or by the representatives of private banks. In the case of transfers of amounts exceeding 2000*l.*, the Bank usually makes an independent inquiry as to the identity of the transferor, but in the case of smaller amounts it is practically impossible to do so. The defendant was on the above-mentioned list of stockbrokers. A woman fraudulently personated another who was a registered holder of India stock, and, having procured herself to be introduced to the defendant as the holder of that stock, instructed him to prepare a transfer. The defendant accordingly sent to the Bank a "ticket," that is a statement of the names of the transferor and transferee, the nature of the stock, and the amount to be transferred, from which ticket the Bank prepared a transfer in the transfer book, and the personator attended and forged the holder's signature in the book, the defendant identifying her as being the holder. The transfer being for a nominal consideration, the defendant, according to the usual practice in such cases, received a fee of one guinea for his services and attendance at the Bank from the transferor. The stock was subsequently transferred to G., who purchased it bona fide and for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register as the holder of the stock, and the Bank, in satisfaction of that

INDIA STOCK—*continued.*
claim, purchased stock of a like amount and transferred it into her name. The Bank then sued the defendant for indemnity in respect of their loss as upon a breach of warranty of the identity of the transferor :—

Held by Farwell L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), affirming the judgment of A. T. Lawrence J., [1907] 1 K. B. 889, that there was evidence on which the Court could find, and that the proper inference of fact was, that the defendant requested the plaintiffs to permit the entry and registration of the forged transfer, which involved the legal consequence that the defendant contracted to indemnify the plaintiffs against any liability resulting therefrom ; and that the plaintiffs were entitled to recover as damages the loss to which they had been put by having to purchase stock as aforesaid. BANK OF ENGLAND *v.* CUTLER **C. A. 208**

INDICTMENT—Amendment of count—Substitution of allegation of fraud for false pretences—Debtors Act - - **270**
See CRIMINAL LAW. 5.

INFANT—*Necessaries—Actual Requirements—Evidence—Onus of Proof—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 2.

In an action against an infant for necessaries the onus is on the plaintiff to prove, not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery. NASH *v.* INMAN - - - - - - - **C. A. 1**

—— Cruelty to children—Custody of child—Wilful neglect - - - - **26**
See CRIMINAL LAW. 4.

—— Intoxicating liquors (sale to children)—Prohibitions of—Exceptions - **539**
See LICENSING ACTS. 4.

—— Workman—Workmen's compensation **551**
See EMPLOYER AND WORKMAN. 4.

INSPECTION—Discovery.
See under DISCOVERY.

INSTALMENTS—Order for payment by—Judgment debt—Execution—Necessity for leave - - - - - - - **899**
See PRACTICE. 4.

INSURANCE (LIFE)—*Agreement that Statement should be the Basis of the Contract—Effect of Answers to Questions put by Medical Referee of Insurers to Assured—Non-disclosure of material Facts—Absence of Fraud.*

One R. M. effected with the defendants an insurance upon her own life in pursuance of a proposal in which she made certain statements, the truth of which was not disputed. She signed a declaration that the statements so made were to the best of her knowledge and belief true, and by which she agreed that "this proposal and declaration" should "be the basis of the contract" between her and the defendants. Subsequently to the proposal, but before

INSURANCE (LIFE)—*continued.*
the execution of the policy, certain questions contained in a printed form were put to her by a doctor, who was instructed by the defendants to put these questions with any necessary explanation and fill in her answers thereto, and to report upon her health, and these questions were answered by her. Many of these questions related to matters of health, the answers as to which could only be matter of opinion, even if given by a medical expert. Among these questions she was asked to give the names of any medical men consulted by her, and to state when and for what she consulted them; and whether, among other complaints, she had ever suffered from mental derangement. The answer to the last-mentioned question was in the negative, whereas in fact she had, though not aware of the fact, been in confinement for acute mania; and, in the answer to the first-mentioned question, as filled in by the doctor, the name of one Dr. K. M., whom she had consulted for nervous breakdown following influenza, was not mentioned. She signed a second declaration contained in the before-mentioned form, wherein she declared, "with reference to the proposal for assurance" on her life and her previous declaration, that the answers to the foregoing questions were all true. This declaration did not state that the answers were to form part of the basis of the contract. The policy did not refer to the proposal or either of the declarations. The assured subsequently committed suicide.

An action having been brought on the policy by the executrix of the assured, the defendants resisted the plaintiff's claim upon the ground that the accuracy of the answers to the above-mentioned questions was made a condition precedent to the validity of the policy, and upon the ground of misstatement and non-disclosure of material facts by the assured. The doctor who put the questions to the assured was not called as a witness at the trial. The jury found in answer to the following questions as follows:—Did the assured fraudulently conceal from the defendants that she had consulted Dr. K. M. for nervous depression? Answer.—She foolishly, but not fraudulently, concealed this fact. Was the fact that she had consulted Dr. K. M. for nervous breakdown material for the company to know in considering whether they would insure the assured's life? Answer.—Yes. Upon these answers judgment was entered for the defendants:—

Held, on appeal from the judgment of Lord Alverstone C.J., [1908] 2 K. B. 431, that although the terms of the first declaration signed by the assured did not exclude the possibility of the truth of her answers to the questions referred to in the second declaration being material to the validity of the policy, yet, having regard to the nature and purpose of those questions, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract.

Held, further, that under the circumstances of the case, without the evidence of the doctor who put the questions to the assured as to what took place when he put the questions to her,

INSURANCE (LIFE)—*continued.*
and what explanation of them he gave to her, the second declaration signed by the assured as above mentioned was not per se sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable. JOEL *v.* LAW UNION AND CROWN INSURANCE COMPANY - **C. A. 863**

INSURANCE (MARINE) — *Warranty against Contraband of War—Persons not Contraband—Breach of Warranty.*

Semble, the term "contraband of war," in its natural sense, and in the absence of special circumstances, or of something in the context pointing to another meaning, is applicable to goods only, and not to persons; and therefore the transport of military officers of a belligerent State as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance.

Judgment of Bigham J., [1908] 1 K. B. 910, affirmed. YANGTSZE INSURANCE ASSOCIATION *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY - - - - - - **C. A. 504**

INTEREST — Bankruptcy notice — Validity — Mistake in amount of interest—Formal defect - - - - - - - **684**
See BANKRUPTCY. 3.

INTOXICATING LIQUOR.
See under LICENSING ACTS.

JUDGMENT—Default of appearance—Costs—Judgment signed for too large an amount—Amendment - - - **410**
See PRACTICE. 3.

—— Summary judgment — Interest — Money-lender's action—Defence - - **266**
See MONEY-LENDERS.

JUDGMENT DEBT—Order for payment by instalments— Execution — Necessity for leave - - - - - - - **899**
See PRACTICE. 4.

JUDICATURE ACT, 1873—Execution—Equitable interest in land—Appointment of receiver - - - - - - **121**
See COUNTY COURT. 1.

JUDICIAL SEPARATION—Petition by wife for —Bill of costs, Insufficiency of - **420**
See SOLICITOR. 2.

JURISDICTION—Arbitrators—Sale of goods by description—Award based on custom subsequently found not to exist - **907**
See ARBITRATION.

—— Attachment—Action by firm—Order for discovery—Refusal of one plaintiff to obey — Application by co-plaintiff for attachment - - - - - **579**
See PRACTICE. 1.

—— Bankers' Books Evidence Act—Order for inspection of books—Jurisdiction of magistrate - - - - - - **949**
See BANKER.

JURISDICTION—*continued.*

—— Divorce proceedings, Order for payment of costs of — Action in King's Bench Division - - - - - - **260**
See DIVORCE.

—— Friendly society—Arbitration under rules—Order to pay costs—Ultra vires - **458**
See FRIENDLY SOCIETY.

—— Mayor's Court—Alternative modes of proof, one shewing jurisdiction, the other not **349**
See PROHIBITION.

—— Revising Barrister, Jurisdiction of Supreme Court to direct, to hold fresh Revision Court - - - - - - - **933**
See PARLIAMENT.

—— Service out of jurisdiction—Writ of summons—Breach of contract - - **161**
See PRACTICE. 6.

JURY—Evidence of accomplice — Absence of corroboration—Omission of judge to caution jury—Effect of on conviction. **680**
See CRIMINAL LAW. 2.

JUSTICES—Bank, Deposit in — Obligation of banker to produce and deliver up **333**
See SUBPŒNA DUCES TECUM.

—— Banker—Order for inspection of books—Jurisdiction of magistrate—Bankers' Books Evidence Act - - - **949**
See BANKER.

—— Bread — Sale otherwise than by weight **534**
See BREAD.

—— Coal mine—Check weigher—Appointment—"Mine"—Two seams in mine - **750**
See MINE.

—— Criminal appeal — Conviction involving "no substantial miscarriage of justice," Meaning of - - - - - - **454**
See CRIMINAL LAW. 1.

—— Criminal appeal—Order for restitution of stolen property - - - - **452**
See CRIMINAL LAW. 3.

—— Cruelty to children—Parent living apart from wife—Wilful neglect - . **26**
See CRIMINAL LAW. 4.

—— Distress—Exempted goods—Implements of trade - - - - - - - **118**
See DISTRESS.

—— Factory—Fencing machinery, Absence of —Limitation of time for laying information - - - - - - - **237**
See FACTORY.

—— Indictment—Amendment of count—Substitution of allegation of fraud for false pretences - - - - - - **270**
See CRIMINAL LAW. 5.

—— Land drainage—Injury to other "land"—Water mill - - - - - - **441**
See LAND DRAINAGE.

JUSTICES—*continued.*

—— Licensing Acts.
See under LICENSING ACTS.

—— Poor rates.
See under RATES.

—— Rates.
See under RATES.

—— Street — Sewer — Satisfaction of urban authority—Evidence - - - **671**
See STREETS.

—— Veterinary Surgeons Act—Qualified person—"Canine specialist" - - - **248**
See VETERINARY SURGEON.

—— Weights and measures.
See under WEIGHTS AND MEASURES.

JUSTIFICATION — Discovery—Libel — Particulars of justification — Allegations of misconduct — Inspection of plaintiffs' books - - - - - - - **151**
See PRACTICE. 2.

"LAND" — Injury to other "land" — Water mill - - - - - - - **441**
See LAND DRAINAGE.

LAND DRAINAGE — *Neglect to cleanse and scour Channel—Injury to other "Land"—Water Mill—Land Drainage Act*, 1847 (10 *&* 11 *Vict. c.* 38), *ss.* 14, 15.

By the Land Drainage Act, 1847, where by reason of the neglect of an occupier of land to cleanse and scour the channel of a stream lying in or bounding his land injury is caused to any other land, the occupier of that land may, after due notice, take steps to cleanse and scour the channel, and may recover the costs, or a just proportion of the costs, from the occupier whose neglect has caused the injury.

The respondent was the owner of a water mill, and the appellant was the occupier of adjacent land through or along which the water passed after it had gone over the mill wheel. A quantity of silt formed in the stream where it passed the appellant's land, and in consequence of the appellant declining to cleanse and scour the channel at that point the water was penned back so as partially to submerge the water mill. Proceedings having been taken by the respondent under the Land Drainage Act, 1847 :—

Held (affirming the decision of a Divisional Court, [1908] 1 K. B. 485), that the provisions of the Act were confined to injury done to the land itself, and did not apply where the injury complained of was injury to a mill.

FINCH *v.* BANNISTER - - - **C. A. 441**

LANDLORD AND TENANT — Disclaimer of lease of plot of land by trustee in bankruptcy — Order vesting in mortgagees whole plot including portion not mortgaged - - - - - **812**
See BANKRUPTCY. 5.

LANDLORD AND TENANT—*continued.*

—— Flats, Building let out in—Negligence—Staircase not lighted — Landlord, Liability of, to persons other than tenants - - - - - - **278**
See FLATS.

—— Lease — Forfeiture, Relief from — Conditional order—Non-fulfilment of conditions - - - - - - - **114**
See LEASE.

LANDS CLAUSES ACTS — *Notice to Treat—Creation of New Interest — Agreement for Tenancy — Surrender — New Agreement — Compensation — Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 18.

By an agreement dated March 15, 1905, one F., as agent for the mortgagees in possession of certain premises, let the premises to one S. for three years from March 14, 1905. On May 15, 1905, notice to treat under the Lands Clauses Consolidation Act, 1845, in respect of the premises, was served by the defendants, a tramway company, on the lessors. By an agreement dated January 23, 1906, S. agreed to stand possessed of the lease of the premises in trust for the plaintiff, and in February the plaintiff entered upon the premises. Subsequently S. informed F., the lessors' agent, that he wished to transfer his interest to the plaintiff, and it was arranged between S., the plaintiff, and F. that the old tenancy should be surrendered, and a new tenancy should be granted to the plaintiff for a term of three years, being about a year longer than the residue of the former term. Accordingly, on February 14, 1906, an agreement was entered into by which F., as the lessors' agent, let the premises to the plaintiff for three years from that date :—

Held, that either the plaintiff or S. as trustee for him was entitled to compensation in respect of the tenancy under the original agreement of March 15, 1905, which still subsisted, in the absence of a valid surrender of it.

Judgment of Jelf J., [1908] 1 K. B. 611, affirmed. ZICK *v.* LONDON UNITED TRAMWAYS, LIMITED - - - - - - **C. A. 126**

LEAD POISONING—Workmen's compensation
See EMPLOYER AND WORKMAN. 5. **837**

LEASE—*Forfeiture—Relief from—Conditional Order—Non-fulfilment of Conditions—Rules of the Supreme Court, Order* XLII., *r.* 2.

Where an order granting relief against the forfeiture of a lease was expressed to be made upon the defendants performing certain conditions, and the defendants having performed part of the conditions declined to perform the remainder and desired to waive the relief :—

Held, that there was no power to compel the defendants to perform the conditions, and that the order for relief must therefore be treated as abandoned. TALBOT *v.* BLINDELL
Walton J. 114

—— Landlord and tenant.
See under LANDLORD AND TENANT.

LIBEL.
See under DEFAMATION.

LICENSING ACTS — *Extinction of Licence—Compensation—Division among Parties interested—Principle of Computation—Determination by County Court—Appeal—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where, under s. 2, sub-s. 3, of the Licensing Act, 1904, the quarter sessions having referred the division of the sum fixed as compensation to be paid for the extinction of a licence among the persons interested in the licensed premises to the county court, and the amount to be received thereout by the licence-holder having been settled by agreement between the parties, the residue had to be apportioned between the lessees of the premises for a term of years, who were brewers, and the freeholders, which apportionment the county court judge made on the basis of the 8 per cent. interest table :—

Held, reversing the judgment of a Divisional Court, that there was no rule or presumption of law, either general or applicable to the circumstances of the particular case, by which the county court judge was bound to treat the respective interests of the parties as 4 per cent. investments, or to adopt the 4 per cent. interest table for the purpose of making the division ; that the valuation of the respective interests in the compensation money was entirely a question of fact to be determined by him upon the circumstances of the particular case ; and that his determination of that question was not subject to review by the High Court.

Quære, whether in such a case there is any right of appeal from the county court judge.

Judgment of a Divisional Court, reported [1908] 1 K. B. 28, reversed. LIVERPOOL CORPORATION *v.* PETER WALKER & SON, LIMITED
C. A. 33

2. —— *Intoxicating Liquor—Sale in Marked Measure—"Long pull"— Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 8.

By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. The appellant, who was the holder of an off licence for the sale of beer, was asked for a pint of beer by a customer. The appellant, in the presence and sight of the customer, twice filled a properly marked half-pint measure and poured the contents into a jug, which had been handed to him by the customer, and added a further quantity of beer to the jug from the tap. The jug, containing a pint and a gill of beer, was then handed to the customer, who paid the appellant the price of a pint of beer :—

Held that, as the pint of beer had been measured in a properly marked measure in the presence and sight of the customer, no offence had been committed under s. 8, and that the subsequent addition of a further quantity of beer was immaterial.

Addy v. *Blake*, (1887) 19 Q. B. D. 478, distinguished. PENNINGTON *v.* PINCOCK
Div. Ct. 244

3. —— *Permitting Drunkenness—Guest after closing Hours—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 13.

Two men, who were found drunk on licensed

LICENSING ACTS—*continued.*
premises after closing hours, were proved to be guests of the licensee and to have been supplied with drink at his expense after closing hours :—

Held, that the licensee was liable to be convicted under s. 13 of the Licensing Act, 1872, of permitting drunkenness upon the premises. LAWSON *v.* EDMINSON - - - **Div. Ct. 952**

4. —— *Sale to Children—Prohibition of—Exceptions — Intoxicating Liquors* (*Sale to Children*) *Act*, 1901 (1 *Edw. 7, c.* 27), *s.* 2.

The holder of a licence who sells or delivers intoxicating liquor to a person under the age of fourteen years in a corked and sealed vessel in a quantity of not less than one reputed pint, for consumption off the premises only, does not commit an offence under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1907, even though the intoxicating liquor is not of a kind commonly sold in a corked and sealed vessel ; inasmuch as the effect of the exception contained in the section is to enable the licence-holder to so sell or deliver not merely intoxicating liquor which is ordinarily sold in a corked and sealed vessel, but any intoxicating liquor which is in fact in a corked and sealed vessel. JONES *v.* SHERVINGTON - - - - - - - **Div. Ct. 539**

LIEN—Carriers — Bill of sale — Bankruptcy—Mutual dealings—Set-off - - **54**
See BILL OF SALE.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT — Flats — Negligence — Staircase not lighted—Landlord, Liability of, to persons other than tenants - - **278**
See FLATS.

LIGHTER—Dock company — Exemption from dock rates - - - - - - **175**
See SHIPPING. 3.

LIMESTONE—Railway company—Mines—Compensation — Purchase — Limestone required to be left unworked - - **606**
See RAILWAY. 1.

LIMITATION OF LIABILITY—Shipping—Bill of lading — Loss due to shipowner's negligence - - - - - - **626**
See SHIPPING. 2.

LIMITATIONS, STATUTE OF—*Acknowledgment —Part Payment by Cheque—Implied Promise to pay Balance of Debt — Date when Promise implied—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16) —*Statute of Frauds Amendment Act*, 1828 (9 *Geo.* 4, *c.* 14), *s.* 1.

The defendant, being indebted to his solicitor in respect of a bill of costs, handed him on May 10, 1900, a cheque in part payment of the bill ; at the same interview it was verbally agreed between the parties that the cheque should not be presented for payment before June 20. On June 20 the cheque was presented for payment at the defendant's bankers, and was duly met. On June 18, 1906, the executors of the solicitor, who had meanwhile died, issued the

LIMITATIONS, STATUTE OF—*continued.*
writ in the present action to recover the balance of the debt upon the bill of costs :—

Held, that the date of part payment of the debt was the date when the cheque was handed by the defendant to his creditor and not the date when the cheque was in fact paid by virtue of the special arrangement ; that, therefore, the only time at which a promise to pay the balance of the debt could be implied from the circumstances under which part payment was made was May 10, 1900, and that, that being more than six years before the issue of the writ, a plea of the Statute of Limitations afforded a good defence to the action. MARRECO *v.* RICHARDSON - - - - - - - - **C. A. 584**

LIVERPOOL—Public park—Poor rate—Rateable value—Beneficial occupation - **647**
See RATES. 3.

LOCAL GOVERNMENT—*Poor Law—Dissolution of Union — Uniting of Parishes—Consent of Guardians—Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 11 —*Poor Law Amendment Act*, 1844 (7 *&* 8 *Vict. c.* 101), *s.* 64.

The Divided Parishes and Poor Law Amendment Act, 1876, s. 11, empowers the Local Government Board to dissolve "any union, whether formed under the Poor Law Amendment Act, 1844, or otherwise" :—

Held (Buckley L.J. dissenting), that the section applied to a union formed under a local Act which created for ever a corporation of guardians (which the Local Government Board had no power to dissolve) with authority to rate within the district in an exceptional manner.

The Poor Law Amendment Act, 1844, s. 64, provides that it shall not be lawful for the Poor Law Commissioners (now represented by the Local Government Board) to unite to another parish for poor law purposes a parish of more than 20,000 persons where the relief of the poor has hitherto been administered in that parish by guardians appointed under a local Act, and not by overseers of the poor, unless they obtain the consent in writing of two-thirds at least of such guardians :—

Held, that this section was not confined to a parish having its own board of guardians, but applied to a parish forming part of a union. THE KING *v.* LOCAL GOVERNMENT BOARD ; *Ex parte* SOUTH STONEHAM UNION - **C. A. 368**

—— London.
See under LONDON.

—— Sewers.
See under SEWERS.

—— Street — Sewer — Satisfaction of urban authority—Evidence - - - **671**
See STREETS.

LODGINGS — Apartments or — Rateability of owner - - - - - - - **134**
See RATES. 1.

LONDON—*Building — High Building—Deposit of Plans—"Before or at the same time" as the Building Notice—Provision directory only—*

LONDON—*continued.*

Local Government—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 145—*London Building Acts Amendment Act*, 1905 (5 *Edw.* 7, *c. ccix.*), *ss.* 7, 22.

The provision in s. 7 of the London Building Acts Amendment Act, 1905 (which deals with means of escape in case of fire in certain new buildings), requiring the deposit of plans "before or at the same time" as the building notice, is directory only, and not a condition precedent either to the jurisdiction of the county council to approve or reject the plans or to the right of the building owner to appeal under s. 22 of the Act to the tribunal of appeal from the rejection of the plans.

So where a building owner, having given a building notice in the case of a high building, subsequently deposited plans shewing the means of escape in case of fire, which were rejected by the county council:—

Held, that he was not precluded from appealing to the tribunal of appeal from the rejection by reason of his failure to deposit the plans before or at the same time as the building notice. LONDON COUNTY COUNCIL *v.* SPINK & SON, LIMITED - - - - - - - - 447

—— Mayor's Court—Alternative modes of proof, one shewing jurisdiction, the other not *See* PROHIBITION. 349

LONDON AND ST. KATHARINE DOCKS ACT, 1864 - - - - - - - 175
See SHIPPING. 3.

LUNACY—*Principal and Agent—Lunatic not so found by Inquisition—Person appointed under Lunacy Act to carry on Business of Lunatic—Personal Liability on Contracts made in carrying on Business—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 124.

By an order made by a Master in Lunacy under s. 116 and s. 120 of the Lunacy Act, 1890, the defendant was authorized to exercise the powers of a committee of the estate of a lunatic not so found by inquisition as in the case of a person of unsound mind so found by inquisition, and to carry on his business, which had been carried on by the lunatic in the name of a firm of which he was the sole partner. While carrying on the business under the order, the defendant ordered goods in the name of the firm, and the goods were supplied by the plaintiffs for the purposes of the business. The plaintiffs having sued the defendant personally for the price of the goods supplied by them:—

Held, that the effect of the order made under the Lunacy Act, 1890, was to make the defendant the agent of the lunatic for the purpose of carrying on his business, and that, in the absence of evidence that the defendant intended to pledge his personal credit, the mere fact that he carried on the business under the order did not make him personally liable to the plaintiffs for the goods supplied by them.

Burt, Boulton & Hayward v. *Bull*, [1895] 1 Q. B. 276, and *Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265, considered. PLUMPTON *v.* BURKINSHAW - - - - - - C. A. 572

MAGISTRATES.
See under JUSTICES.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MASTER—Appeal from decision of—Trial of garnishee issue by Master - - 548
See PRACTICE. 5.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MAYOR'S COURT—Alternative mode of proof, one shewing jurisdiction, the other not - - - - - - - 349
See PROHIBITION.

MEASURES—Weights and.
See under WEIGHTS AND MEASURES.

MENS REA—Coal—Representation by employer—Innocent delivery by servant - 289
See WEIGHTS AND MEASURES. 2.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MIDLAND RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891 - - - - 356
See RAILWAY. 3.

MILL—Water mill—Land drainage—Injury to other "land" - - - - - 441
See LAND DRAINAGE.

MINE—*Coal Mine—Check Weigher—Appointment—"Mine"—Two Seams in Mine—Coal Mines Regulation Act*, 1887, (50 & 51 *Vict. c.* 58), *s.* 13, *sub-s.* 1.

By s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887, it is provided that the persons who are employed in a mine and are paid according to the weight of mineral gotten by them may appoint a check weigher.

In a mine not divided into parts under s. 19 of the Act there were two seams of coal worked as one mine by separate gangs of miners paid according to the weight of mineral gotten by them:—

Held, that the two seams together constituted a "mine" within the meaning of s. 13, and consequently that the miners working in one of the seams could not under that section appoint a check weigher in respect of the mineral gotten from that seam. THORPE *v.* DAVIES Sutton J. 750

—— Railway company—Compensation—Purchase—Limestone required to be left unworked - - - - - - 606
See RAILWAY. 1.

MISAPPROPRIATION—Bankruptcy—Proof—Breach of trust—Director of company and member of partnership - - 817
See BANKRUPTCY. 6.

MISCONDUCT — Allegations of — Discovery — Libel — Justification — Inspection of plaintiffs' books - - - - **151**
See PRACTICE. 2.

MISDIRECTION—Libel—Personal imputation—New trial - - - - - **309**
See DEFAMATION. 1.

MISTAKE—Bankruptcy notice—Validity—Mistake in amount of interest — Formal defect - - - - - - **684**
See BANKRUPTCY. 3.

MONEY-LENDERS—*Practice—Summary Judgment—Interest—Money-lender's Action—Defence under Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51)—*Admission of Balance remaining due on actual Advance — Rules of Supreme Court, Order XIV., r.* 4.

Where the plaintiff in a money-lender's action applies for leave to sign final judgment under Order XIV., and the defendant sets up a defence under the Money-lenders Act, 1900, but admits that he still owes some part of the money actually advanced, the proper order is to order summary judgment for the amount admitted to be due without interest and to give leave to defend for the residue of the claim.

Wells v. *Allott*, [1904] 2 K. B. 842, explained and distinguished. LARARUS *v.* SMITH
C. A. 266

MORTGAGE—Bankruptcy — Disclaimer — Order vesting in mortgagees whole plot of land including portion not mortgaged - **812**
See BANKRUPTCY. 5.

NECESSARIES—Infant—Alleged requirements—Onus of proof - - - - **1**
See INFANT.

NEGLIGENCE—Dangerous premises—Staircase in possession of landlord—Staircase not lighted—Liability - - - **278**
See FLATS.

—— Evidence—Negligent course of conduct—Dangerous practice—Evidence of similar acts or omissions - - - - **601**
See EVIDENCE.

—— Ship—Registered owner holding as trustee — Priorities — Principal and agent — Estoppel - - - - - **484**
See TRUSTEE.

—— Shipping—Bill of lading—Loss due to shipowner's negligence - - - **626**
See SHIPPING. 2.

—— Water company — Liability to reinstate pavement — Subsidence — Omission of road authority to rectify - - **594**
See WATER COMPANY.

NUISANCE—Tramway company — Damage to plants in adjoining land - - **14**
See TRAMWAYS.

NOTICE—Bankruptcy notice.
See under BANKRUPTCY.

NOTICE—*continued.*

—— Rates—Notice of appeal—Notice to assessment committee—Entry and respite of appeal - - - - - - **635**
See RATES. 2.

—— Workmen's compensation - - - - **551**
See EMPLOYER AND WORKMAN. 4.

"OPTION"—Workmen's Compensation - **551**
See EMPLOYER AND WORKMAN. 4.

PARK—Poor rate—Rateable value—Beneficial occupation — Public park — Liverpool Improvement Acts - - - **647**
See RATES. 3.

PARLIAMENT—*Franchise—Objection — Prima facie Proof of Ground of Objection—Rebutting Evidence—Evidence of Repute—Jurisdiction of Supreme Court to direct Revising Barrister to hold fresh Revision Court—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 10.

The provisions of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, which require an objector to give prima facie proof of the ground of his objection before the revising barrister, and provide for the giving of such prima facie proof to the satisfaction of the revising barrister "by evidence, repute, or otherwise," are in aid of the objector, who may give prima facie proof of his objection by evidence of repute; the sub-section does not authorize the revising barrister to rely upon evidence of repute as distinguished from proof in order to defeat the objection.

Where the Court, upon the hearing of a case stated by a revising barrister, is of opinion that the effect of proceedings before the revising barrister is to shew that certain entries in the lists of voters of names objected to have not in fact been revised according to law, it may in the exercise of its inherent jurisdiction direct the revising barrister to hold another Court for the revision of those entries, notwithstanding that the period limited by statute for revising the lists has expired. KENT *v.* FITTALL (No. 2)
C. A. 933

PARTNERSHIP — Action by firm — Order for discovery—Refusal by one co-plaintiff to obey—Application by co-plaintiff for attachment—Jurisdiction - - **579**
See PRACTICE. 1.

—— Breach of trust—Director of company and member of partnership—Misappropriation—Joint and several proof - **817**
See BANKRUPTCY. 3.

PLANS—London Building Acts—High building—Deposit of plans - - - **447**
See LONDON.

PLANTS — Tramway company — Damage to plants in adjoining land - - **14**
See TRAMWAYS.

PLEADINGS — Practice — Gaming—New consideration—Amendment of pleadings at trial - - - - - - - **696**
See GAMING.

POLICY—Life insurance - - - - **863**
See INSURANCE (LIFE).

—— Marine insurance.
See under INSURANCE (MARINE).

POLLUTION — Rivers pollution prevention — "Sewers" - - - - - - **780**
See SEWERS.

POOR LAW—Dissolution of union—Uniting of parishes—Consent of guardians - **368**
See LOCAL GOVERNMENT.

POOR RATE ASSESSMENT AND COLLECTION ACT, 1869 - - - - - - **134**
See RATES. 1.

POOR RATES.
See under RATES.

PRACTICE—*Action by Firm—Order for Discovery — Refusal of one Plaintiff to obey — Application by Co-plaintiff for Attachment—Jurisdiction.*

After the dissolution of a partnership one of the two partners commenced an action in the firm name to recover a debt alleged to be due to the partnership, and gave to the other partner, who did not consent to the action and who disclaimed all right to any sum that might be recovered, an indemnity against the costs to be incurred. An order requiring "the plaintiffs" to make a further and better affidavit of documents was served by the defendant upon the partner bringing the action, who made a further affidavit and served a copy of the order on his partner, and, on the refusal of the latter to make an affidavit, applied for an order of attachment against him on the ground of his non-compliance with the order for a further and better affidavit of documents :—

Held, that the Court had jurisdiction to make the order of attachment. SEAL & EDGELOW *v.* KINGSTON - - - - - - **C. A. 579**

2. —— *Discovery — Libel — Justification — Particulars of Justification—Allegations of Misconduct—Inspection of Plaintiffs' Books.*

A defendant to an action for libel who pleads a justification must state in his defence or in his particulars of justification the specific facts or instances upon which he relies in order to prove his plea, and he can obtain inspection of the plaintiffs' books or documents only in respect of such specific facts or instances.

To an action by a firm of stock and share dealers for a libel in a newspaper, the innuendo placed upon the alleged libel being that it meant that the plaintiffs carried on their business in an improper manner and were fraudulent stock and share dealers and persons who could not be trusted in business dealings, the defendant pleaded a justification and delivered particulars of the plea, in which he alleged that the plaintiffs were not members of the London Stock Exchange, but were concerned in running a "bucket-shop,"

PRACTICE—*continued.*

and that they did not carry on the ordinary and legitimate business of stockbrokers, but were entirely dependent for their profits upon the losses made by their customers. In a further set of particulars the defendant gave the names of, and extracts from, certain pamphlets on methods of money-making issued by the plaintiffs. In neither set of particulars did the defendant give any specific instance of the commission by the plaintiffs of any fraudulent or improper act, or the name of any person alleged to have been defrauded by, or to have suffered loss at the hands of, the plaintiffs. The defendant having taken out a summons for an order that he should be at liberty to inspect the books of the plaintiffs for a certain period :—

Held that, as the particulars of justification contained no specific instances of the misconduct alleged, they were too general to entitle the defendants to inspection of the plaintiffs' books.

Yorkshire Provident Life Assurance Co. v. *Gilbert*, [1895] 2 Q. B. 148, discussed and followed. ARNOLD & BUTLER *v.* BOTTOMLEY **C. A. 151**

3. —— *Judgment—Default of Appearance—Costs—Judgment signed for too large an Amount — Amendment — Accidental Slip — Rules of Supreme Court, Order XIII., r. 3 ; Order XXVIII., r. 11.*

Where judgment has been signed in an action for a liquidated demand in default of appearance, and, through an error arising from an accidental slip, the amount included in the judgment for costs exceeds by a few shillings the amount properly allowable for costs, the judgment may be amended, under Order XXVIII., r. 11, by reducing it to the proper amount.

In an action by the plaintiff, as indorsee, against the defendant, as acceptor, of a bill of exchange for 2500*l.*, judgment was signed in default of appearance. The amount included in the judgment so signed for costs was 5*l.* 6*s.*, which exceeded by the sum of 12*s.* the amount properly allowable in the particular case according to the scale of costs in force with regard to judgments by default. The plaintiff having issued a writ of fieri facias upon the judgment, goods of the defendant were seized under the writ. The defendant applied to set aside the judgment as having been irregularly signed. An affidavit made by the clerk to the plaintiff's solicitors, who attended at the district registry when the judgment was signed, stated that he looked at the list of costs there exhibited, and inadvertently filled in the wrong amount :—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the defendant was not entitled to have the judgment set aside, and that there was power to amend it under Order XXVIII., r. 11, which ought to be exercised.

Anlaby v. *Prætorius*, (1888) 20 Q. B. D. 764, and *Hughes* v. *Justin*, [1894] 1 Q. B. 667, distinguished. ARMITAGE *v.* PARSONS - **C. A. 410**

4. *Judgment Debt—Order for Payment by Instalments—Execution—Necessity for Leave—Execution Act*, 1844 (7 & 8 *Vict. c.* 96), *s.* 61—

PRACTICE—*continued.*

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Rules of Supreme Court, Order* XLII., *r.* 24.

Where judgment has been recovered in the High Court for a sum of money, and an order has been made by the judge in bankruptcy under s. 5 of the Debtors Act, 1869, for payment of the judgment debt by instalments, execution may issue under Order XLII., r. 24, of the Rules of the Supreme Court for the amount of instalments which have become due and are unpaid.

Semble, the power to order the issue of execution as provided by s. 61 of the Execution Act, 1844, can be exercised by any judge of the High Court and is not confined to the judge in bankruptcy. WOODHAM SMITH *v.* EDWARDS. **C. A. 899**

5. —— *Trial of Garnishee Issue by Master—Appeal from Decision of Master—Rules of Supreme Court, Order* XL., *rr.* 6, 6A; *Order* LIV., *r.* 21.

An appeal lies under Order XL., r. 6, to a Divisional Court from the decision of a Master upon the trial of an issue ordered by him under Order XLV., r. 4, in garnishee proceedings. BLAIR *v.* CLARK. GRAYDON, GARNISHEE. **Div. Ct. 548**

6. —— *Writ of Summons—Service out of Jurisdiction—Breach of Contract, whether within or out of the Jurisdiction—Contract for Sale of Goods c.i.f.—Rules of Supreme Court, Order* XI., *r.* 1 (*e*).

Goods were sold under a c.i.f. contract by a foreigner carrying on business and resident abroad to purchasers in England, who paid the price in exchange for the bill of lading. On inspection of the goods after their arrival in England, the purchasers alleged that they were not of the description stipulated for in the contract, and obtained leave to issue a writ, of which notice was to be served (and was served) on the defendant out of the jurisdiction, claiming a return of the money paid or damages for breach of contract:—

Held that, the contract of sale being a c.i.f. contract, the alleged breach had taken place out of the jurisdiction, and that therefore the case did not fall within Order XI., r. 1 (*e*), and the writ and service must be set aside.

Barrow v. *Myers*, (1888) 4 Times L. R. 441; 52 J. P. 345, overruled. CROZIER, STEPHENS & CO. *v.* AUERBACH - - - - **C. A. 161**

—— Amendment of pleadings at trial—Gaming—New consideration - - - **696**
See GAMING.

—— New trial—Misdirection—Libel—Personal imputation—Plea of fair comment
See DEFAMATION. 1, 2. **309, 325, n.**

PREVENTION OF CRUELTY TO CHILDREN ACT—Wilful neglect - - - **26**
See CRIMINAL LAW. 4.

PRINCIPAL AND AGENT—Lunacy—Person appointed to carry on business of lunatic—Personal liability on contracts - **572**
See LUNACY.

PRINCIPAL AND AGENT—*continued.*

—— Ship—Registered owner holding as trustee—Negligence—Priorities - - **484**
See TRUSTEE.

—— Stock Exchange—Right of broker to indemnity from client - - - - **514**
See STOCK EXCHANGE.

PRIORITIES—Ship—Registered owner holding as trustee—Negligence—Principal and agent - - - - - - **484**
See TRUSTEE.

PROHIBITION — *Mayor's Court — Alternative Modes of Proof, one shewing Jurisdiction, the other not.*

The maker of a promissory note which was expressed in the body of it to be payable at an address within the City of London was sued upon the note in the Mayor's Court. Neither plaintiff nor defendant resided or carried on business within the City, nor did any part of the cause of action arise within it, except the fact that presentment at the address named was, unless waived, necessary to render the defendant liable:—

Held, that although the plaintiff's case might be established by proving waiver of presentment, and therefore without shewing that any part of the cause of action arose within the jurisdiction, upon the plaintiff undertaking to rely upon presentment in the City and not upon waiver, an order for prohibition ought not to be granted. JOSOLYNE *v.* ROBERTS - - - **Div. Ct. 349**

PROOF—Bankruptcy.
See under BANKRUPTCY.

—— Mayor's Court—Alternative modes of proof, one shewing jurisdiction, the other not
See PROHIBITION. **349**

—— Onus of proof — Evidence — Infant — Necessaries - - - - - **1**
See INFANT.

PUBLIC HEALTH—Street.
See under STREETS.

RACING.
See under GAMING.

RAILWAY—*Mines—Compensation—Purchase—Limestone required to be left unworked—London and Birmingham Railway Company Act*, 1833 (3 *Will.* 4, *c. xxxvi.*), *ss.* 54, 55, 58.

By a private Act, passed prior to the Railways Clauses Consolidation Act, 1845, authorizing the construction of a railway and containing the usual provisions for the acquisition of lands, mines and minerals (including by name limestone) were excepted out of the purchase of lands, but it was provided that, upon receipt of a twenty-one days' notice from the proprietor of any mines or minerals lying under or within forty yards of the railway of his desire to work them, the railway company might purchase them or any part of them.

The claimants were the owners in fee of land on both sides of the railway and of limestone

RAILWAY—*continued.*

lying under their land and under the railway; they had a cement manufactory on their land, in which they used and turned into cement the limestone which they quarried. Owing to the cost of carriage the limestone when quarried had no market value as an article of commerce other than its value to the claimants for use in their adjacent manufactory. The claimants, having in the ordinary course of quarrying approached close to the forty yards limit, gave notice to the railway company of their intention to work the limestone within that limit, and the railway company gave separate notices to treat in respect of the limestone within that limit, but not under the railway, and of the limestone actually under the railway, and the amount of compensation was referred to arbitration :—

Held, (1.) that as the limestone had no market value in the strict sense of that term, its value to the claimants was what they might fairly be expected to have made out of it by working it in the ordinary and reasonable manner in which it would have been worked but for the notices to treat; (2.) that the profits which the claimants would have made by turning it into cement might properly be taken into consideration by the arbitrator as an indication, though not as a measure, of that value; and (3.) that the value was not affected by the fact that the claimants owned large quantities of other limestone which they might have worked instead of the stone in question.

The Act provided that, after its passing, no shaft, pit, or quarry should be dug, sunk, or made "in or on" the railway. With respect to the limestone lying under the railway, the arbitrator found that the claimants, by entering upon their property, could and would have worked and gotten the stone without going on to the surface of the railway, but the effect would have been to cause the subsidence of the rails and ballast :—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Kennedy L.J. dissenting), that such a mode of working would have involved the making of a quarry "in," though not "on," the railway, and would have been in contravention of the statute, and that therefore the limestone under the railway had no assessable value.

Decision of Bray J., [1908] 1 K. B. 925, reversed.

Eden v. *North Eastern Ry. Co.*, [1907] A. C. 400, discussed. RUGBY PORTLAND CEMENT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - **C. A. 606**

2. —— *Regulation — Increase of Rates — Reasonableness—Change in Condition of Trade —Evidence—Railway and Canal Traffic Act*, 1894 (57 *&* 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

Upon a complaint that an increase of a rate for the carriage of coal as from August 1, 1900, over the defendants' railways was unreasonable, an order was made that, if the defendants relied for justification on any change in the mode or expense of carrying coal, they were to give particulars thereof. No such particulars were given. At the hearing before the Railway Commissioners it was proved on behalf of the defendants that in 1895, at the request of the colliery owners, owing to the depression in the coal trade, the defendants reduced the rates for the carriage of coal; that in 1900 the coal trade was in a prosperous condition, the price of coal having risen considerably; and that on August 1, 1900, the defendants raised the rates to what they had been in 1895 before the reduction was made. The Commissioners (Sir James Woodhouse dissenting) having found that the increase of the rates was reasonable :—

Held, that the evidence as to the rise in the price of coal was not given for the purpose of proving an increase in the expense of carrying the coal, but for the purpose of proving that the depression which was the cause of the reduction in the rates had passed away and had been succeeded by a period of prosperity, and therefore the evidence was not excluded by the order for particulars; and that, consequently there was evidence upon which the Railway Commissioners were entitled to find that the increase of the rates was reasonable.

Judgment of the Railway and Canal Commission, [1908] 1 K. B. 771, affirmed. NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY, LONDON AND NORTH WESTERN RAILWAY COMPANY, GREAT WESTERN RAILWAY COMPANY, AND SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY - **C. A. 765**

3. —— *Siding Accommodation—Rates and Charges—Reasonableness—Provisional Order of Board of Trade—Midland Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 *&* 55 *Vict. c. ccwix.*).

The schedule of maximum rates and charges annexed to a provisional order of the Board of Trade with reference to the plaintiff railway company fixed as the maximum charge for any accommodation or services rendered by the company within the scope of their undertaking by the desire of a trader and not otherwise provided for by the schedule such reasonable sum as the company might think fit. The railway company gave notice to a firm of coal merchants that in future they would make a charge of 6*d.* per day per waggon in respect of all waggons remaining on their wait order sidings beyond a specified time, but notwithstanding this notice the firm continued to use the company's sidings and to keep their trucks there beyond the specified time. In an action against the firm before a special jury for siding rent on the footing of the notice Lawrance J. withdrew the case from the jury and gave judgment for the plaintiffs on the ground of an implied contract by the defendants to pay the stipulated charge :—

Held, that the subject-matter of the action was within the schedule and that the question of the reasonableness of the charge was for the

RAILWAY—*continued.*
jury, and a new trial ordered. MIDLAND RAILWAY COMPANY *v.* MYERS, ROSE & CO.
C. A. 356

RATES—*Apartments or Lodgings—Rating—Rateability of Owner—Parliamentary Borough—Abatement or Deduction—Tenement wholly let out in Apartments or Lodgings—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.

The respondent was the owner of a tenement situate in a borough which in the year 1867 was, and ever since had been, a parliamentary borough. The tenement was wholly let out in apartments or lodgings not separately rated within the meaning of s. 7 of the Representation of the People Act, 1867. Purporting to act under that section, the rating authority rated the respondent as owner, instead of the occupiers of the tenement, without allowing him any commission, abatement, or deduction :—

Held, that the Act under which the respondent was rateable as owner instead of the occupiers was not the Representation of the People Act, 1867, but was the Poor Rate Assessment and Collection Act, 1869, and that he was entitled to the commission, abatement, or deduction specified in s. 3 or s. 4 of the later Act. DAVIS (ON BEHALF OF THE ISLINGTON CORPORATION) *v.* WALLIS - - - - - - **Div. Ct. 134**

2. —— *Appeal—Notice of Appeal—Notice to Assessment Committee—Entry and Respite of Appeal—Poor Rate—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By s. 1 of the Union Assessment Committee Amendment Act, 1864, "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union . . . ." :—

Held by Sir Gorell Barnes, President, and Farwell L.J. (Fletcher Moulton L.J. dissenting), that where written notice of appeal against a poor rate had been given to an assessment committee less than twenty-one days before the first practicable quarter sessions after the decision appealed against, the appellants were nevertheless entitled to have the appeal entered and its hearing respited to the next sessions. THE KING *v.* YORKSHIRE (WEST RIDING) JUSTICES
C. A. 635

3. —— *Park—Public Park — Poor Rate — Rateable Value—Beneficial Occupation—Liverpool Improvement Act*, 1865 (28 & 29 *Vict. c. xx.*), *ss.* 14, 16—*Liverpool Improvement and Waterworks Act*, 1871 (34 & 35 *Vict. c. clxxxiv.*), *s.* 52.

A corporation, not charged with the duty of providing a public park, were empowered by statute to purchase land which they might think suitable for public parks or playgrounds and

RATES—*continued.*
places of recreation for the inhabitants of the borough, and to lay out and appropriate the same for any of such purposes, and to make by-laws for the management and regulation thereof. They were also empowered to sell or lease all or any part of the lands so acquired which should not be required for the purposes of the Act, and (by a further statute) to make by-laws for regulating the days and hours during which any park was to be open or shut, and the prices of admission on any special occasion, provided that the days on which the park might be shut should not exceed seven days in any one year. The corporation purchased land which they formed into a park and appropriated to the public use, and made a by-law under which the park might be closed for not more than seven days in any one year, and the corporation might charge or allow the person to whom the use of the park on those days was granted to make a charge for admission, not exceeding five shillings for each person. The park had not been closed for fifteen years, when the corporation had permitted it to be used for a fête in aid of a local charity, and a charge for admission was made by the persons so using the park :—

Held, that the corporation were not occupiers of the park for rating purposes, and that the park was not rateable to the poor rate.

Lambeth Overseers v. *London County Council*, [1897] A. C. 625, discussed. LIVERPOOL CORPORATION v. ASSESSMENT COMMITTEE OF WEST DERBY UNION AND OVERSEERS OF WALTON
C. A. 647

—— Railway—Regulation—Increase of rates—Reasonableness - - - - **765**
See RAILWAY. 2.

—— Ship — Dock company — Exemption from rates—Lighter - - - - **175**
See SHIPPING. 3.

RECEIVER—Execution—Equitable interest in land—Appointment of receiver - **121**
See COUNTY COURT. 1.

REMOTENESS — Damage — Savage dog—Liability of owner—Intervening act of third person - - - - - **825**
See DOG.

RENT—Distress for—Lessee adjudicated bankrupt the same day - - - - **330**
See BANKRUPTCY. 4.

REPRESENTATION OF THE PEOPLE ACT, 1867 - - - - - - **134**
See RATES. 1.

RESTITUTION OF STOLEN PROPERTY—Order for—Appeal by person against whom order made - - - - - **452**
See CRIMINAL LAW. 3.

REVENUE—*Estate Duty—Allowance — Incumbrances—Bona fide Creation—Consideration—"Wholly for the Deceased's own Use and Benefit"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1 (*a*).

In 1897 the Gordon Richmond estates in

REVENUE—*continued.*
Scotland were subject to an entail in the Scotch form under which the defendant's father, the Duke of Richmond, was heir of entail in possession, and the order of succession after him was (1.) the defendant, (2.) his son Lord S., (3.) the heirs male of the body of Lord S. In that year the Duke took proceedings in the Court of Session under the Entail Acts for Scotland to obtain the approval of the Court to an instrument of disentail, without the consent of the defendant and his son. Following the proper procedure under those Acts, the interests of the defendant and Lord S. under the settlements were valued at 415,000*l.* and 287,000*l.* respectively, and the Duke executed bonds charging the estates with those sums. The Court thereupon approved an instrument of disentail which was duly recorded and registered. The Duke thereupon became entitled to the estates in fee simple subject to those charges. The defendant and his son settled the sums secured by the bonds upon the defendant for life with remainder to Lord S. In 1898 the Duke made a revocable mortis causa disposition of the estates subject to the mortgage bonds by which they were entailed after his death to the defendant and Lord S. in succession with remainders over as before, but, owing to the fact that Lord S. had issue living at the date of this deed, its effect was to tie up the estates for another generation. Interest on the bonds was not paid in full to the defendant during the life of the Duke, but he executed furthur bonds charging the estates with balance due to the defendant to the amount of 88,314*l.* The main motive of the late Duke in thus resettling the estates was to lessen the amount of estate duty payable on his death, but all the deeds and instruments, including the bonds, were genuine instruments intended to have their full operation. The defendant's father, the Duke, died in 1903, and the defendant claimed to deduct from the capital value of the estates passing on the death, which amounted to 1,102,221*l.*, for the purpose of estate duty certain debts and incumbrances, including the bonds for 415,000*l.* and 287,000*l.* and 88,314*l.*, leaving an excess of debts and incumbrances over the value of the estates as ascertained for the purposes of estate duty of 47,092*l.* :—

Held, that the bonds were incumbrances created bona fide for full consideration in money's worth wholly for the deceased's own use and benefit within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, and that the defendant was therefore entitled to make the deduction claimed.

Decision of Bray J., [1907] 2 K. B. 923, affirmed. ATTORNEY-GENERAL *v.* DUKE OF RICHMOND, GORDON AND LENNOX (No. 1) **C. A. 729**

2. —— *Income Tax — Company resident in United Kingdom—Shares held in Foreign Company—Control—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sched. D.*

An English company carrying on business in the United Kingdom was the holder of all the shares in a German company :—

Held, that that fact alone did not make the business of the German company the business of

REVENUE—*continued.*
the English company so as to render the English company liable to income tax, under Sched. D of 16 & 17 Vict. c. 34, upon the full amount of the profits made by the German company ; and that the English company was only liable to pay income tax upon such profits of the German company as had been received in this country.

Decision of Walton J., [1906] 2 K. B. 856, affirmed. GRAMOPHONE AND TYPEWRITER, LIMITED *v.* STANLEY - - - - **C. A. 89**

REVISING BARRISTER — Jurisdiction of Supreme Court to direct, to hold fresh Revision Court - - - - - **933**
See PARLIAMENT.

RIVER — Sewer — Facilities for carrying off liquids from factories—Rivers pollution prevention - - - - - **780**
See SEWERS.

ROAD. *See* under HIGHWAY.

RULES OF SUPREME COURT :—**Order XI., r. 1** (*e*)—*Service out of the Jurisdiction*
See PRACTICE. 6. **161**

—— **Order XIII., r. 3**—*Default of Appearance*
See PRACTICE. 3. **410**

—— **Order XIV., r. 4**—*Summary Judgment* - **266**
See MONEY-LENDERS.

—— **Order XXVIII., r. 11**—*Amendment* - **410**
See PRACTICE. 3.

—— **Order XL., rr. 6, 6A**—*Motion for Judgment*
See PRACTICE. 5. **548**

—— **Order XLII., r. 2**—*Execution* - - **114**
See LEASE.

—— —— **r. 24** - - - - - - **260**
See DIVORCE.

—— —— **r. 24** - - - - - - **899**
See PRACTICE. 4.

—— **Order LIV., r. 21** — *Application, &c., at Chambers* - - - - - **548**
See PRACTICE. 5.

—— **Order LXVIII., r. 1**—*Application of Rules in Crown, &c. Cases* - - - **260**
See DIVORCE.

SALE—Bread—Sale otherwise than by weight
See BREAD. **534**

—— Licensing Acts.
See under LICENSING ACTS.

SALE OF GOODS—By description—Award based on custom subsequently found not to exist—Custom inconsistent with written contract - - - - - **907**
See ARBITRATION.

—— Execution—Warrant sent to foreign Court —Binding the property in goods of execution debtor—Time - - **254**
See COUNTY COURT. 2.

SALE OF GOODS—*continued.*
—— Infant—Necessaries—Actual requirements—Evidence—Onus of proof - - 1
See INFANT.

SEAMAN—Workmen's compensation - 108
See EMPLOYER AND WORKMAN. 6.

SERVANT. *See* under EMPLOYER AND WORKMAN.

SERVICE—Out of jurisdiction—Writ of summons—Breach of contract - - 161
See PRACTICE. 6.

SET-OFF—Bill of sale—Carrier's lien—Bankruptcy—Mutual dealings - - 54
See BILL OF SALE.

SETTLEMENT—Post-nuptial settlement—Purchaser for valuable consideration—Refraining from divorce proceedings - 169
See BANKRUPTCY. 7.

SEWER GAS—Workmen's compensation—Injury by accident - - - - - 807
See EMPLOYER AND WORKMAN. 7.

SEWERS—*Facilities for carrying off Liquids from Factories—Local Government—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

By s. 7 of the Rivers Pollution Prevention Act, 1876, "every sanitary or other authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers . . . . provided . . . . that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district":—

Held (reversing the judgment of a Divisional Court, [1908] 2 K. B. 341), that the word "sewers" in the proviso to the section refers not only to the pipes in which the sewage is received, but to the whole sewage system of the authority.

Guthrie & Co. v. *Brechin Magistrates*, (1888) 15 R. 385, not followed. BROOK *v.* MELTHAM URBAN DISTRICT COUNCIL - - C. A. 780

—— Land drainage.
See under LAND DRAINAGE.

—— Street—Satisfaction of urban authority—Evidence - - - - - - 671
See STREETS.

SHIPPING—*Bill of Lading—Construction—Inaccessibility of Port of Discharge on account of Ice—"Unsafe in consequence of War, Disturbance, or any other Cause"—Ejusdem Generis Principle—"Error in Judgment of Master"—Signature of Bill of Lading by Time Charterers on behalf of Shipowners.*

Goods were shipped on board a steamship for a foreign port under bills of lading containing the following conditions and exceptions: "(2.) Error in judgment, negligence or default of . . . . master . . . . whether in navigating the ship or otherwise"; "(4.) Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease":—

Held, (1.) that inaccessibility was a question of fact, and that the port must be inaccessible not merely at the moment of the ship's arrival off the port, but also for a reasonable time after her arrival and first attempt to enter; (2.) that the words "or any other cause" must be read as being ejusdem generis with war or disturbance, and that therefore the case was not brought within the exception because the master deemed the port unsafe or inaccessible on account of ice; and (3.) that the expression "error in judgment of the master" did not include a mistake as to the extent of his powers owing to his misconstruction of the bills of lading.

When the bills of lading were signed, the steamship was under a time charter containing the following clause:—"(12.) The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo . . . ." One of the bills of lading was not signed by the captain, but by the time charterers "for the captain and owners":—

Held by Farwell and Kennedy L.JJ. (Vaughan Williams L.J. dubitante), that the signature of the bill of lading by the time charterers bound the shipowners.

Decision of Channell J., [1908] 1 K. B. 185, affirmed. TILLMANNS & Co. *v.* SS. KNUTSFORD, LIMITED - - - - - - - C. A. 385

2. —— *Bill of Lading—Limitation of Shipowner's Liability — Loss due to Shipowner's Negligence.*

The plaintiffs shipped two packages of leather goods on board the defendants' ship for carriage from London to Buenos Ayres under a bill of lading containing a clause which specified a large number of excepted perils for which the defendants were not to be responsible, whether the peril, or the loss or damage arising therefrom, was caused by the negligence of the defendants' servants or agents or not, and a further clause by which the defendants were not to be accountable at all for bullion or other specified valuable or fragile articles "nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package" unless shipped under a special declaration of value and extra freight paid. The plaintiffs' goods were not delivered at Buenos Ayres, and their loss was found as a fact to have been due to the negligence

SHIPPING—*continued.*

of the defendants' servants; they had not been shipped under a special declaration of value, nor had extra freight been paid upon them :—

Held that, notwithstanding that the loss was due to the negligence of the defendants, they were only liable to the limited extent provided by the bill of lading.

Decision of Bigham J., [1908] 1 K. B. 796, affirmed. BAXTER'S LEATHER COMPANY *v.* ROYAL MAIL STEAM PACKET COMPANY **C. A. 626**

3. —— *Dock Company — Exemption from Dock Rates—Lighter—"Bona fide engaged in discharging or receiving Goods to or from on board of any Ship or Vessel"—Ship or Vessel "lying therein"—London and St. Katharine Docks Act*, 1864 (27 *&* 28 *Vict. c. clxxviii.*), *s.* 136.

By a section of a dock company's Act it was provided that "all lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

A lighter entered one of the company's docks in order to discharge goods into a steamship then lying in the dock, and finished discharging her goods into the steamship at 5 P.M. on Saturday. The steamship left the dock on the next tide, at about midnight on that day; the lighter remained in the dock until the early morning tide on the following Monday, when it left :—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the lighter was bona fide engaged until her departure in discharging goods to a vessel lying in the dock within the meaning of the above-mentioned section, and that in leaving the dock she was doing an act which was part and parcel of her entering into the dock to discharge her goods into the steamship, and that therefore she was exempt under the section from payment of dock rates.

A lighter was taken into the same dock with the bona fide intention of discharging goods into a steamship then lying in the dock, but the steamship finished loading her cargo without taking on board any of the goods in the lighter, and left the dock two days after the lighter entered. The lighter remained in the dock for four days after her entry, when another steamship entered the dock, and the lighter at once commenced discharging her goods into her and continued until they were all discharged eight days afterwards :—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that the expression "lying therein" in the above-mentioned section meant any vessel lying in the dock at the time of the discharge of goods to her from a lighter, and was not confined to the case of a vessel lying in the dock at the time of the entry of the lighter, and that, therefore, a lighter

SHIPPING—*continued.*

which entered the dock to serve a particular ship already lying in the dock, and, being unsuccessful in doing so, remained in the dock bona fide for the purpose of discharging to or receiving from some other ship, was exempt from dock rates. MCDOUGALL & BONTHRON, LIMITED *v.* LONDON AND INDIA DOCKS COMPANY. PAGE, SON & EAST, LIMITED *v.* THE SAME - - **C. A. 175**

4. —— *General Average—Injury to Ship—Unloading Cargo for purpose of repairing Ship — Damage to Cargo — Practice of Average Adjusters.*

The owner of cargo which, not having been itself in any peril, has suffered damage from having been unloaded to enable repairs to be done to a ship which has through ordinary perils of navigation suffered a particular average loss, is not entitled to general average contribution from the owner of the ship.

A ship, having through ordinary perils of navigation sustained injuries which prevented her from proceeding upon her voyage, put back into port for repairs. To enable the ship to be repaired the cargo, which was never in peril, was unloaded, and, in the process of being unloaded, was damaged :—

Held, that the owners of the cargo were not entitled to general average contribution from the owners of the ship.

Svensden v. *Wallace*, (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404, discussed. HAMEL *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY - **Lord Alverstone C.J. 298**

—— Seaman—Workmen's compensation - **108**
See EMPLOYER AND WORKMAN. 6.

—— Ship—Priorities—Registered owner holding as trustee—Negligence - - **484**
See TRUSTEE.

SIDING ACCOMMODATION—Rates and charges —Reasonableness—Provisional Order of Board of Trade - - - - **356**
See RAILWAY. 3.

SIGNATURE—Of bill of lading by time charterers on behalf of shipowners - - **385**
See SHIPPING. 1.

SOLICITOR—*Bill of Costs*—"*Disbursements*"—*Counsel's Fees—Fees not paid before Delivery of Bill—Taxation—Practice—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

For the purpose of taxation of a solicitor's bill under the Solicitors Act, 1843, "disbursements" means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed. SADD *v.* GRIFFIN - - **C. A. 510**

2. —— *Bill of Costs — Petition by Wife for Judicial Separation—Bill for extra Costs only—Bill for Party and Party Costs previously delivered to Husband — Insufficiency of Bill—Practice—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

The plaintiffs had acted as solicitors for the defendant's wife on a petition by her in the High

SOLICITOR—*continued.*
Court for a judicial separation. The petition was dismissed, but the defendant was ordered to pay the costs as between party and party, and accordingly the plaintiffs delivered to him a bill of party and party costs. That bill having been taxed, the defendant paid to the plaintiffs the amount allowed upon the taxation. The plaintiffs then delivered to the defendant a bill in respect of the extra costs of the proceedings on the petition as between solicitor and client, which bill did not contain the items allowed in respect of party and party costs. This bill not being paid, the plaintiffs sued the defendant for the amount of it as for necessaries supplied to the wife :—
Held (reversing the judgment of Pickford J., [1908] 1 K. B. 590), that the bill was not a sufficient bill within the meaning of the Solicitors Act, 1843, s. 37, and therefore the action was not maintainable.
Quære whether in a case where the wife's petition had failed such an action could be maintainable. COBBETT *v.* WOOD - **C. A. 420**

STATUTES :—

1623.

21 Jac. 1, c. 16—*Limitation* - - - **584**
See LIMITATIONS, STATUTE OF.

1710.

9 Anne, c. 14—*Gaming* - - - - **696**
See GAMING.

1743.

17 Geo. 2, c. 38, s. 4—*Poor Relief* - - **635**
See RATES. 2.

1828.

9 Geo. 4, c. 14, s. 1—*Statute of Frauds Amendment* - - - - - - - **584**
See LIMITATIONS, STATUTE OF.

1833.

3 Will. 4, c. xxxvi., ss. 54, 55, 58—*London and Birmingham Ry. Co.* - - - **606**
See RAILWAY. 1.

1835.

5 & 6 Will. 4, c. 41, s. 1—*Gaming* - - **696**
See GAMING.

1836.

6 & 7 Will. 4, c. 37, s. 4—*Bread* - - **534**
See BREAD.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - - **420**
See SOLICITOR. 2.

1844.

7 & 8 Vict. c. 96, s. 61—*Execution* - - **899**
See PRACTICE. 4.

7 & 8 Vict. c. 101, s. 64—*Poor Law* - **368**
See LOCAL GOVERNMENT.

1845.

8 & 9 Vict. c. 18, s. 18—*Lands Clauses* - **126**
See LANDS CLAUSES ACTS.

STATUTES—*continued.*
8 & 9 Vict. c. 109, s. 18—*Gaming* - - **696**
See GAMING.

1847.

10 & 11 Vict. c. 17, s. 32—*Waterworks Clauses*
See WATER COMPANY. **594**

10 & 11 Vict. c. 38, ss. 14, 15—*Land Drainage*
See LAND DRAINAGE. **441**

1851.

14 & 15 Vict. c. 100, s. 1—*Criminal Procedure*
See CRIMINAL LAW. 5. **270**

1853.

16 & 17 Vict. c. 34, Sched. D.—*Income Tax*
See REVENUE. 2. **89**

1864.

27 & 28 Vict. c. 39, s. 1—*Union Assessment Committee* - - - - - **635**
See RATES. 2.

27 & 28 Vict. c. clxxviii., s. 136—*London and St. Katharine Docks* - - - **175**
See SHIPPING. 3.

1865.

28 & 29 Vict. c. xx., ss. 14, 16—*Liverpool Improvement* - - - - - - **647**
See RATES. 3.

1867.

30 & 31 Vict. c. 102, s. 7—*Representation of the People* - - - - - - **134**
See RATES. 1.

1869.

32 & 33 Vict. c. 41, ss. 3, 4—*Poor Rate Assessment and Collection* - - - **134**
See RATES. 1.

32 & 33 Vict. c. 62, s. 5—*Debtors Act* - **899**
See PRACTICE. 4.

—— —— s. 13, sub-s. 1 - - - - **270**
See CRIMINAL LAW. 5.

1871.

34 & 35 Vict. c. clxxxiv., s. 52—*Liverpool Improvement and Waterworks* - **647**
See RATES. 3.

1872.

35 & 36 Vict. c. 94, s. 8—*Licensing* - **244**
See LICENSING ACTS. 2.

—— —— s. 13 - - - - - - **952**
See LICENSING ACTS. 3.

1873.

36 & 37 Vict. c. 60, s. 5—*Extradition* - **333**
See SUBPŒNA DUCES TECUM.

36 & 37 Vict. c. 66, s. 89—*Judicature* - **121**
See COUNTY COURT. 1.

1875.

38 & 39 Vict. c. 55, s. 150—*Public Health* **671**
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STATUTES—*continued.*

1876.

39 & 40 Vict. c. 61, s. 11—*Divided Parishes and Poor Law* - - - - - **368**
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39 & 40 Vict. c. 75, s. 7—*Rivers Pollution Prevention* - - - - - - **341**
See SEWER.

1878.

41 & 42 Vict. c. 26, s. 28, sub-s. 10—*Parliamentary and Municipal Registration*
See PARLIAMENT. **933**

41 & 42 Vict. c. 31, s. 4—*Bills of Sale* - **54**
See BILL OF SALE.

1879.

42 Vict. c. 11, ss. 7, 10—*Bankers' Books Evidence* - - - - - - - - **949**
See BANKER.

1881.

44 & 45 Vict. c. 62, s. 17, sub-s. 1—*Veterinary Surgeons* - - - - - - **248**
See VETERINARY SURGEON.

1883.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*)—*Bankruptcy* - - - - - - - **692**
See BANKRUPTCY. 1.

—— —— s. 4, sub-s. 1 (*g*) - - - **474**
See BANKRUPTCY. 2.

—— —— s. 4, sub-s. 1 (*g*); s. 143, sub-s. 1
See BANKRUPTCY. 3. **684**

—— —— s. 38 - - - - - - **54**
See BILL OF SALE.

—— —— ss. 42, 43 - - - - **330**
See BANKRUPTCY. 4.

—— —— s. 47 - - - - - - **169**
See BANKRUPTCY. 7.

—— —— s. 55, sub-s. 6 - - - - **812**
See BANKRUPTCY. 5.

—— —— Sched. II., r. 18 - - - **817**
See BANKRUPTCY. 6.

1887.

50 & 51 Vict. c. 58, s. 13, sub-s. 1—*Coal Mines Regulation* - - - - - - **750**
See MINE.

1888.

51 & 52 Vict. c. 21, s. 4—*Distress* - - **118**
See DISTRESS.

51 & 52 Vict. c. 43, s. 105—*County Courts* **692**
See BANKRUPTCY. 1.

—— —— s. 147 - - - - - - **118**
See DISTRESS.

—— —— s. 158 - - - - - - **254**
See COUNTY COURT. 2.

STATUTES—*continued.*

1889.

52 & 53 Vict. c. 21, s. 21—*Weights and Measures* - - - - - - **293**
See WEIGHTS AND MEASURES. 1.

—— —— s. 29 - - - - - - **289**
See WEIGHTS AND MEASURES. 2.

1890.

53 & 54 Vict. c. 5, ss. 116, 120, 124—*Lunacy*
See LUNACY. **572**

1891.

54 & 55 Vict. c. ccxix.—*Midland Railway Company (Rates and Charges) Order Confirmation* - - - - - **356**
See RAILWAY. 3.

1893.

56 & 57 Vict. c. 71, s. 2—*Sale of Goods* - **1**
See INFANT.

—— —— s. 26 - - - - - - **254**
See COUNTY COURT. 2.

1894.

57 & 58 Vict. c. 30, s. 7, sub-s. 1 (*a*)—*Finance*
See REVENUE. 1. **729**

57 & 58 Vict. c. 54, s. 1—*Railway and Canal Traffic* - - - - - - - **765**
See RAILWAY. 2.

57 & 58 Vict. c. 60, ss. 24, 26, 31, 56, 57—*Merchant Shipping* - - - **484**
See TRUSTEE.

57 & 58 Vict. c. ccxiii., s. 145—*London Building* - - - - - - - - **447**
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1896.

59 & 60 Vict. c. 25, s. 68—*Friendly Societies*
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1897.

60 & 61 Vict. c. 37, s. 1, sub-ss. 2 (*b*), 4; s. 2, sub-s. 1—*Workmen's Compensation* **551**
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1901.

1 Edw. 7, c. 22, ss. 10, 135, 136, 146—*Factory and Workshop* - - - - - **237**
See FACTORY.

1 Edw. 7, c. 27, s. 2—*Intoxicating Liquors (Sale to Children)* - - - - **539**
See LICENSING ACTS. 4.

1904.

4 Edw. 7, c. 15, s. 1, sub-s. 1—*Prevention of Cruelty to Children* - - - **26**
See CRIMINAL LAW. 4.

4 Edw. 7, c. 23, s. 2—*Licensing* - - **33**
See LICENSING ACTS. 1.

1905.

5 Edw. 7, c. ccix., ss. 7, 22—*London Building*
See LONDON, **447**

STATUTES—*continued.*

1906.

6 Edw. 7, c. 47, ss. 1, 3; s. 5, sub-s. 3—*Trade Disputes* - - - - - **844**
See TRADE UNION.

6 Edw. 7, c. 58, s. 1, sub-s. 1—*Workmen's Compensation* - - **796, 807, 926**
See EMPLOYER AND WORKMAN. 3–7, 9.

—— —— ss. 1, 13 - - - - **802**
See EMPLOYER AND WORKMAN. 10.

—— —— s. 4, sub-ss. 1, 4 - - - **567**
See EMPLOYER AND WORKMAN. 8.

—— —— s. 6, sub-s. 1 - - - - **758**
See EMPLOYER AND WORKMAN. 2.

—— —— s. 8, sub-ss. 1 and 2; Sched. III. **837**
See EMPLOYER AND WORKMAN. 5.

—— —— s. 13 - - - - - **754**
See EMPLOYER AND WORKMAN. 1.

—— —— Sched. I. (2) (*a*) - - - **108**
See EMPLOYER AND WORKMAN. 6.

1907.

7 Edw. 7, c. 23, s. 4, sub-s. 1—*Criminal Appeal*
See CRIMINAL LAW. 1. **454**

—— —— s. 6, sub-s. 2 - - - - **452**
See CRIMINAL LAW. 3.

STOCK EXCHANGE—*Principal and Agent—Right of Broker to Indemnity from Client—Contract made by Broker not in accordance with Authority given.*

The defendant on various occasions instructed the plaintiff, a country stockbroker, to effect for her purchases and sales of stocks and shares in the usual way through brokers on the London Stock Exchange. On receipt of her instructions, the plaintiff effected various purchases and sales of stocks and shares in a manner of which the following transaction is an example. The defendant having instructed the plaintiff to buy certain American railway shares for her, the plaintiff gave an order for the purchase of the shares to a firm of brokers on the London Stock Exchange, between whom and himself there was an arrangement that in such cases they should deal at a "net" price for the shares, i.e., a price arrived at by adding to the purchase price such sum as the London brokers might fix as their remuneration for the transaction. The London brokers thereupon bought the shares from a jobber, and sent a bought note to the plaintiff charging "98½ net" for the shares, the price at which they bought from the jobber not being disclosed. The plaintiff then sent a bought note to the defendant charging her 98½ for the shares (without adding the word "net") plus a commission of 7*s.* 6*d.* and 1*s.* for the stamp. It appeared that the amount added by the London brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by the plaintiff against the defendant for a balance alleged to be due to him in respect of the above-mentioned transactions:—

Held by Sir Gorell Barnes, President, and Fletcher Moulton L.J. (Farwell L.J. dissenting), that the contracts effected by the plaintiff, being

STOCK EXCHANGE—*continued.*

contracts not made through the London brokers as agents, but made with them as principals, were not in accordance with the authority given to the plaintiff by the defendant, and therefore he was not entitled to indemnity from the defendant in respect of them; and, consequently, that the action was not maintainable.

Judgment of Bucknill J., [1908] 2 K. B. 82, affirmed. JOHNSON *v.* KEARLEY - **C. A. 514**

—— Stock, transfer of—Personation of holder—Identification of transferor by stockbroker—Effect of transfer—Estoppel.
See INDIA STOCK. **208**

STOCKBROKER.
See under STOCK EXCHANGE.

STREETS — *Sewer — Satisfaction of Urban Authority — Evidence — Local Government — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

In a road which was a street within s. 150 of the Public Health Act, 1875, but which was not a highway repairable by the inhabitants at large, an urban authority in 1881, at the cost of the rates, constructed a sewer for soil only, the surface-water from the road and the adjoining houses, both before and after 1881, being carried away by channels at the side of the road. In 1904, there having been no change since 1881 in the number or character of the adjoining houses, the urban authority gave notice under s. 150 to the frontagers in the road to construct a sewer in the road for the purpose of carrying away the surface-water. The frontagers, contending that the road was not a street not sewered to the satisfaction of the urban authority within s. 150, did not comply with the notice, and on their default the urban authority themselves constructed the sewer and sought to charge the expenses on the frontagers:—

Held, that it was a question of fact for the justices whether the road was a street not sewered to the satisfaction of the urban authority, and that the fact that the urban authority had themselves constructed a sewer in the road in 1881, and had done nothing further with regard to the drainage of the road until 1904, did not as a matter of law preclude the justices from finding as a fact on the evidence that in 1904 the road was not sewered to the satisfaction of the urban authority. BLOOR *v.* BECKENHAM URBAN DISTRICT COUNCIL - **Div. Ct. 671**

SUB-CONTRACTOR—Workman employed by—Liability of principal - - - **567**
See EMPLOYER AND WORKMAN. 5.

SUBPŒNA DUCES TECUM — *Sealed Packet containing Formula—Deposit in Bank—Obligation of Banker to produce and deliver up—Extradition Act*, 1873 (36 & 37 *Vict. c.* 60), *s.* 5.

A sealed packet may be a "document" and therefore liable to production upon a subpœna duces tecum.

The fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositors is no answer to a subpœna duces

SUBPŒNA DUCES TECUM—*continued.*
tecum requiring the banker to produce the document.

Where there is disobedience to a subpœna duces tecum, the Court has jurisdiction to enforce obedience by attachment, even though the disobedience is not wilful.

Reg. v. *Lord John Russell*, (1839) 7 Dow, 693, explained. THE KING *v.* DAYE. **Div. Ct. 333**

SUBSIDENCE—Water company—Liability to reinstate pavement—Omission of road authority to rectify - - - **594**
See WATER COMPANY.

SUMMARY JUDGMENT.
See under JUDGMENT.

SURGEON—Veterinary.
See under VETERINARY SURGEON.

SURRENDER—Lands Clauses Acts—Notice to treat—Agreement for tenancy—Surrender—New agreement—Compensation - - - - - - **126**
See LANDS CLAUSES ACTS.

TAXATION—Solicitors' costs.
See under SOLICITOR.

TAXES.
See under REVENUE

TENANT—Landlord and.
See under LANDLORD AND TENANT.

THIRD PERSON—Intervening act of—Savage dog—Liability of owner—Scope of employment - - - - **825**
See DOG.

TIME—Factory—Fencing of machinery, Absence of—Limitation of time for laying information - - - - - **237**
See FACTORY.

—— Writ of execution—Warrant sent to foreign country - - - - - **254**
See COUNTY COURT. 2.

TORT—Tortious act of fellow-workman—Workmen's compensation—Act having no relation to the employment - - **796**
See EMPLOYER AND WORKMAN. 9.

TRADE—Distress—Exempted goods—Implements of trade - - - - **118**
See DISTRESS.

TRADE UNION—*Member of Union—Workman—Debt due to Union—Interference with Employment—Threatening Employers—"Trade Dispute"—In contemplation or furtherance of a Trade Dispute—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *ss.* 1, 3; *s.* 5, *sub-s.* 3.

In 1900 the plaintiff, a member of a trade union, was fined 10*s.* for a breach of the union rules; this fine was not paid. In 1907 the plaintiff joined another branch of the union, and was in employment with other union men as a boiler scaler. The defendant, who was the district delegate of the union, at the instigation of some of the plaintiff's fellow-workmen who knew of the unpaid fine, and of the treasurer of the branch of the union which had imposed it, went to the foreman of the plaintiff's employers and told him that if the plaintiff were not "stopped" there would be trouble with the men. The defendant had no authority from the executive of the union to do this. The plaintiff, having been dismissed from his employment as a result of the defendant's interference, brought an action against him claiming 50*l.* damages. The jury found that there was not a trade dispute existing or contemplated by the men; that the defendant uttered a threat to the plaintiff's employers with the intention of preventing the plaintiff from getting employment; that this was done to compel the plaintiff to pay the arrear of fine and to punish him for not paying it; that this was not done only to warn the plaintiff's employers that the union men would leave in consequence of their being unwilling to work with the plaintiff, and that it was not done in consequence of their objecting to work with him; and that the defendant did something more than act on behalf of the men employed by the plaintiff's employers. Judgment for the plaintiff for 50*l.* had been given in the county court. On appeal:—

Held, upon these findings, that the act of the defendant was done "in contemplation or furtherance of a trade dispute" within the meaning of s. 3 of the Trade Disputes Act, 1906, and that he was entitled to the protection of that section, and that judgment must be entered for the defendant.

Meaning of "trade dispute" and scope and effect of s. 3 of the Trade Disputes Act, 1906, discussed and explained. CONWAY *v.* WADE **C. A. 844**

TRAMWAYS—*Nuisance—Creosote used in paving Road—Tramway Company—Damage to Plants in adjoining Land—Knowledge—Statutory Authority—Exceptional use of Land.*

The defendants, a tramway company, who were by their special Act under an obligation to pave certain parts of a road, on which their tramway was laid, with wood paving, used for that purpose wood blocks coated with creosote. The fumes given off by the creosote injured plants and shrubs belonging to the plaintiff, a market gardener, whose premises were near the road. There was another kind of wood paving in use which the defendants might have used, and which could not have caused injury to the plaintiff's plants and shrubs. In an action by the plaintiff in respect of the damage caused as above mentioned, the jury found that it was reasonably necessary for the defendants to pave the road as they did according to their knowledge at the time, but that in the light of the evidence given at the trial it was not reasonably necessary:—

Held, affirming the decision of a Divisional Court, that the defendants were not authorized by their special Act to use the particular kind of wood paving which they had used, and that, although they did not know that the use of creosoted wood might cause damage, and were not guilty of negligence, they were, upon the

TRAMWAYS—*continued.*
principle laid down in *Fletcher* v. *Rylands*, (1886) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330, liable to the plaintiff in respect of the damage sustained by him. WEST *v.* BRISTOL TRAMWAYS COMPANY - - - **C. A. 14**

TRANSFER—Stock—Personation of holder—Identification of transferor by stock-broker—Effect of transfer—Estoppel
See INDIA STOCK. **208**

TRIAL — Amendment of pleadings at trial—Gaming—New consideration - **696**
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—— Appeal from decision of Master—Trial of garnishee issue by Master - - **548**
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—— New trial—Libel—Plea of fair comment—Misdirection - - - - **309**
See DEFAMATION. 1.

TRUSTEE—*Trustee and Cestui que Trust—Principal and Agent—Conflicting Equities—Contract by Trustee to charge Trust Property in Breach of Trust — Priorities — Ship — Registered Owner holding as Trustee—Beneficial Owner allowing Legal Ownership to remain vested in Trustee—Negligence—Estoppel—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 24, 26, 31, 56, 57—*Mortgage of Shares.*

In furtherance of a project for the formation of a company to purchase a ship, the plaintiffs, who were owners of shares in the ship, executed transfers of their respective shares to one H., the senior partner in a firm of H. & Co., which managed the ship's business, as trustee for them, with power to sell the shares to the company if formed; and H. was registered as owner of the shares in the register of shipping at the port to which the ship belonged. The project for formation of the company proved abortive, but the above-mentioned shares were not reconveyed to the plaintiffs. Subsequently a son of H., who acted as the manager of H. & Co.'s financial business, obtained for the purposes of the firm from the defendant, through an agent for the defendant, without the knowledge or authority of the plaintiffs, an advance of money, which was intended to be secured by a mortgage by H. of the above-mentioned shares. A document which purported to be, and was registered as, such a mortgage turned out to be a nullity, never having been duly executed by H., the aforesaid manager having obtained H.'s signature to a printed form with blank spaces, which he subsequently handed to the defendant's agent for the purpose of his filling in the blank spaces with the material particulars of the proposed mortgage, which he did. The money advanced by the defendant was used for the purposes of the firm. The defendant had no notice of the plaintiffs' interest in the shares. In an action brought by the plaintiffs, claiming that the mortgage deed should be declared void, and the entry of it expunged from the register, Bigham J. granted the relief claimed; but, thinking the effect of the evidence to be that H. had agreed with the defendant to give such a mortgage, he

TRUSTEE—*continued.*
held that, inasmuch as the plaintiffs had entrusted H. with authority to deal with their shares in the ship, although he had not dealt with them in accordance with the authority given, the defendant was entitled in equity to a charge on the shares:—

Held (reversing the decision of the learned judge), that the fact that the plaintiffs had constituted H. the legal owner of the shares, and allowed him to appear as such on the register, did not, under the above-mentioned circumstances, give rise to an equity entitling the defendant as against the plaintiffs to a charge upon the shares as security for the money advanced by him.

Rimmer v. *Webster*, [1902] 2 Ch. 163, discussed. BURGIS *v.* CONSTANTINE - **C. A. 484**

—— Partnership—Breach of trust—Director of company and member of partnership—Misappropriation — Joint and several proof - - - - - - **817**
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TRUSTEE IN BANKRUPTCY.
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ULTRA VIRES—Friendly society—Order to pay costs—Jurisdiction - - - **458**
See FRIENDLY SOCIETY.

UNION—Trade union.
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VESTING ORDER—Bankruptcy—Disclaimer—Order vesting in mortgagees whole plot including portion not mortgaged - **812**
See BANKRUPTCY. 5.

VETERINARY SURGEON—*Qualified Person—Veterinary Surgeons Act*, 1881 (44 & 45 *Vict. c.* 62), *s.* 17, *sub-s.* 1—*Use of Description by an unqualified Person stating special Qualification*—"*Canine Specialist.*"

By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17. sub-s. 1, Any person not possessing the prescribed qualification who after December 31, 1883, "takes or uses . . . . any name, title, addition, or description stating that he is . . . . a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

The respondent, who was not possessed of the qualifications specified by the section, exhibited outside his residence a board with his name and the words "Canine specialist. Dogs and cats treated for all diseases":—

Held, that these words constituted a description stating that he was specially qualified to practise a branch of veterinary surgery, and that he was therefore liable under the section. ROYAL COLLEGE OF VETERINARY SURGEONS *v.* COLLINSON - - - - **Div. Ct. 248**

WARRANTY—Contraband of war—Persons not contraband—Breach of warranty **504**
See INSURANCE (MARINE).

WATER COMPANY—*Negligence—Liability to reinstate Pavement—Subsidence—Omission of Road Authority to rectify—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 32.

The mere passive omission by a road authority to rectify a subsidence in a road in their area which has been originally occasioned by the neglect of a water company to make good the road after having broken it up for the purposes of their undertaking does not exonerate the water company from liability for an injury caused to a person using the road by reason of the subsidence. HARTLEY *v.* ROCHDALE CORPORATION - - - - - **Div. Ct. 594**

WATER MILL—Land drainage — Injury to other "land" - - - - - **441**
See LAND DRAINAGE.

WATERWORKS.
See under WATER COMPANY.

WEIGHTS AND MEASURES—*Coal—Delivery in a Vehicle—Several Deliveries under one Order—One Ticket—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.

The respondents, having sold to a purchaser twelve tons of coal, delivered a portion of the coal in sacks in a vehicle to the purchaser on September 23, 1907, and at the same time, before any part of the coal was unloaded, gave to the purchaser a ticket according to the form in the Third Schedule to the Weights and Measures Act, 1889, for the delivery of twelve tons of coal in 240 sacks, each sack containing 1 cwt. On October 2, 1907, thirty sacks of coal, each sack containing 1 cwt., being the remaining portion of the twelve tons, were sent by the respondents in a vehicle for delivery to the purchaser and were delivered to him. No separate ticket was delivered or sent to the purchaser in respect of the thirty sacks of coal:—

Held, that the coal having been delivered in sacks and a ticket for the entire quantity having been delivered to the purchaser on September 23, the failure of the respondents to give a separate ticket in respect of the coal delivered on October 2 did not constitute a breach of the provisions of s. 21 of the Weights and Measures Act, 1889. KYLE *v.* DUNSDON - **Div. Ct. 293**

2. —— *Vehicle carrying Coal for Delivery—Person in charge of Vehicle—False Representation of Weight—Representation by Employer—Innocent Delivery by Servant—Mens rea—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.

By s. 29 of the Weights and Measures Act, 1889, an inspector may enter any building where coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or delivery to a purchaser, and may weigh any quantity of coal found in any such place or vehicle or which is in course of delivery to any purchaser; and if it appears to a Court of summary jurisdiction that any quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, is liable to a fine:—

Held, that to constitute an offence under this section on the part of a person in charge of a vehicle carrying coal for delivery a mens rea is necessary, and, consequently, that a servant in charge of a vehicle who was innocently delivering therefrom to customers coal of less weight than that represented by his employers, and who had himself no knowledge of any short weight, was not guilty of an offence under the section. PAUL *v.* HARGREAVES - **Div. Ct. 289**

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WINDOW CLEANER—"Workman"—Employment of a casual nature—Workmen's compensation - - - - - **802**
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